OFFICE OF THE UNIVERSITY REGISTRAR
STUDENT SERVICE CENTER
1140 AMSTERDAM AVENUE
205 KENT HALL, MAIL CODE 9202
NEW YORK, NEW YORK 10027
(212) 854-4400

SEAL OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK

Columbia College, Engineering and Applied Science, General Studies, Graduate School of Arts and Sciences, International and Public Affairs, Library Service, Human Nutrition, Nursing, Occupational Therapy, Physical Therapy, Professional Studies, Special Studies Program, Summer Session
A, **B**, **C**, **D**, **F** (excellent, good, fair, poor, failing). NOTE: Plus and minus signs and the grades of **P** (pass) and **HP** (high pass) are used in some schools. The grade of **D** is not used in Graduate Nursing, Occupational Therapy, and Physical Therapy.

American Language Program, Center for Psychoanalytic Training and Research, Journalism
P (pass), **F** (failing). Grades of **A**, **B**, **C**, **D**, **P** (pass), **F** (failing) — used for some offerings from the American Language Program Spring 2009 and thereafter.

Architecture
HP (high pass), **P** (pass), **LP** (low pass), **F** (failing), and **A**, **B**, **C**, **D**, **F** — used June 1991 and thereafter **P** (pass), **F** (failing) — used prior to June 1991.

Arts
P (pass), **LP** (low pass), **F** (fail). **H** (honors) used prior to June 2015.

Business
H (honors), **HP** (high pass), **P1** (pass), **LP** (low pass), **P** (unweighted pass), **F** (failing); plus (+) and minus (-) used for H, HP and P1 grades Summer 2010 and thereafter.

College of Physicians and Surgeons
H (honors), **HP** (high pass), **P** (pass), **F** (failing).

College of Dental Medicine
H (honors), **P** (pass), **F** (failing).

Law
A through **C** [plus (+) and minus (-) with **A** and **B** only], **CR** (credit - equivalent to passing). **F** (failing) is used beginning with the class which entered Fall 1994. Some offerings are graded by **HP** (high pass), **P** (pass), **LP** (low pass), **F** (failing). **W** (withdrawn) signifies that the student was permitted to drop a course, for which he or she had been officially registered, after the close of the Law School's official Change of Program (add/drop) period. It carries no connotation of quality of student performance, nor is it considered in the calculation of academic honors.
E (excellent), **VG** (very good), **G** (good), **P** (pass), **U** (unsatisfactory), **CR** (credit) used from 1970 through the class which entered in Fall 1993.

Any student in the Law School's Juris Doctor program may, at any time, request that he or she be graded on the basis of Credit-Fail. In such event, the student's performance in every offering is graded in accordance with the standards outlined in the school's bulletin, but recorded on the transcript as Credit-Fail. A student electing the Credit-Fail option may revoke it at any time prior to graduation and receive or request a copy of his or her transcript with grades recorded in accordance with the policy outlined in the school bulletin. In all cases, the transcript received or requested by the student shall show, on a cumulative basis, all of the grades of the student presented in single format – i.e., all grades shall be in accordance with those set forth in the school bulletin, or all grades shall be stated as Credit or Fail.

Public Health
A, **B**, **C**, **D**, **F** - used Summer 1985 and thereafter. **H** (honors), **P** (pass), **F** (failing) — used prior to Summer 1985.

Social Work
E (excellent), **VG** (very good), **G** (good), **MP** (minimum pass), **F** (failing).
A though **C** is used beginning with the class which entered Fall 1997. Plus signs used with **B** and **C** only, while minus signs are used with all letter grades. The grade of **P** (pass) is given only for select classes.

OTHER GRADES USED IN THE UNIVERSITY

AB = Excused absence from final examination.

AR = Administrative Referral awarded temporarily if a final grade cannot be determined without additional information.

AU = Audit (auditing division only).

CP = Credit Pending. Assigned in graduate courses which regularly involve research projects extending beyond the end of the term. Until such time as a passing or failing grade is assigned, satisfactory progress is implied.

F* = Course dropped unofficially.

IN = Work Incomplete.

MU = Make-Up. Student has the privilege of taking a second final examination.

R = For the Business School: Indicates satisfactory completion of courses taken as part of an exchange program and earns academic credit.

R = For Columbia College: The grade given for course taken for no academic credit, or notation given for internship.

R = For the Graduate School of Arts and Sciences: By prior agreement, only a portion of total course work completed. Program determines academic credit.

R = For the School of International and Public Affairs: The grade given for a course taken for no academic credit.

UW = Unofficial Withdrawal.

UW = For the College of Physicians and Surgeons: Indicates significant attempted coursework which the student does not have the opportunity to complete as listed due to required repetition or withdrawal.

W = Withdrew from course.

YC = Year Course. Assigned at the end of the first term of a year course. A single grade for the entire course is given upon completion of the second term. Until such time as a passing or failing grade is assigned, satisfactory progress is implied.

OTHER INFORMATION

NOTE: All students who cross-register into other schools of the University are graded in the **A, B, C, D, F** grading system regardless of the grading system of their own school, except in the schools of Arts (prior to Spring 1993) and in Journalism (prior to Autumn 1992), in which the grades of P (pass) and **F** (failing) were assigned. Notations at the end of a term provide documentation of the type of separation from the University.

% of **A** Effective fall 1996: Transcripts of Columbia College students show the percentage of grades in the **A** (**A+**, **A**, **A-**) range in all classes with at least 12 grades, the mark of **R** excluded. Calculations are taken at two points in time, three weeks after the last final examination of the term and three weeks after the last final of the next term. Once taken, the percentage is final even if grades change or if grades are submitted after the calculation. For additional information about the grading policy of the Faculty of Columbia College, consult the College Bulletin.

KEY TO COURSE LISTINGS

A course listing consists of an area, a capital letter(s) (denotes school bulletin) and the four digit course number (see below).

*The **capital letter** indicates the University school, division, or affiliate offering the course:*

A	Graduate School of Architecture, Planning, and Preservation
B	School of Business
BC	Barnard College
C	Columbia College
D	College of Dental Medicine
E	School of Engineering and Applied Science
F	School of General Studies
G	Graduate School of Arts and Sciences
H	Reid Hall (Paris)
J	Graduate School of Journalism
K	School of Library Services/Continuing Education (effective Fall 2002)
L	School of Law
M	College of Physicians and Surgeons, Institute of Human Nutrition, Program in Occupational Therapy, Program in Physical Therapy, Psychoanalytical Training and Research
N	School of Nursing
O	Other Universities or Affiliates/Auditing
P	School of Public Health
Q	Computer Technology/Applications
R	School of the Arts
S	Summer Session
T	School of Social Work
TA-TZ	Teachers College
U	School of International and Public Affairs
V	Interschool Course
W	Interfaculty Course
Y	Teachers College
Z	American Language Program

UNDER THE PROVISION OF THE FAMILY EDUCATION RIGHTS AND PRIVACY ACT OF 1974, THIS TRANSCRIPT MAY NOT BE RELEASED OR REVEALED TO A THIRD PARTY WITHOUT THE WRITTEN CONSENT OF THE STUDENT.

*The **first digit** of the course number indicates the level of the course, as follows:*

0	Course that cannot be credited toward any degree
1	Undergraduate course
3	Undergraduate course, advanced
4	Graduate course open to qualified undergraduates
5	Graduate course open to qualified undergraduates
6	Graduate course
7	Graduate course
8	Graduate course, advanced
9	Graduate research course or seminar

Note: Level Designations Prior to 1961:
1-99 Undergraduate courses
100-299 Lower division graduate courses
300-999 Upper division graduate courses

The term designations are as follows:
X=Autumn Term, Y=Spring Term, S=Summer Term
Notations at the end of a term provide documentation of the type of separation from the University.

THE ABOVE INFORMATION REFLECTS GRADING SYSTEMS IN USE SINCE SPRING 1982. THE CUMULATIVE INDEX, IF SHOWN, DOES NOT REFLECT COURSES TAKEN BEFORE SPRING OF 1982. ALL TRANSCRIPTS ISSUED FROM THIS OFFICE ARE OFFICIAL DOCUMENTS. TRANSCRIPTS ARE PRINTED ON TAMPER-PROOF PAPER, ELIMINATING THE NEED FOR SIGNATURES AND STAMPS ON THE BACK OF ENVELOPES. FOR CERTIFICATION PURPOSES, A REPRODUCED COPY OF THIS RECORD SHALL NOT BE VALID. THE HEAT-SENSITIVE STRIP, LOCATED ON THE BOTTOM EDGE OF THE FACE OF THE TRANSCRIPT, WILL CHANGE FROM BLUE TO CLEAR WHEN HEAT OR PRESSURE IS APPLIED. A BLUE SIGNATURE ALSO ACCOMPANIES THE UNIVERSITY SEAL ON THE FACE OF THE TRANSCRIPT.

March 10, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write to offer my enthusiastic recommendation for Mr. Cameron Molis, a recent graduate of Columbia Law School and recent applicant for a clerkship in your chambers. In the brief time I have known Mr. Molis, he has distinguished himself as a student of the finest caliber, one whose candle power and positive mojo is infectious with others (myself included). In short, Mr. Molis is an incredibly articulate, thoughtful, and insightful student, and I venture that he is destined to become an exceptional lawyer (and clerk). I recommend him enthusiastically, without reservation.

I first met Mr. Molis when he was enrolled in my Corporate Law class during the Fall Semester of 2020. This is a gateway course for the business law curriculum, and it tends to produce large enrollments. My course is no exception to this norm, with just over 125 students. I consider it to be the most difficult course I teach at Columbia, and I make it so by design. I tend to frame and motivate the course not only against black letter law, but also against the longer arc of "theory of the firm" literature in economics and business, from Coase to Berle & Means to Jensen & Meckling to Williamson and beyond. Typical law students find this framing and required synthesis challenging, but in my view it has become a non-negotiable canon within sophisticated business law practice (and policy). Throughout the process, Mr. Molis made important and constructive contributions and interventions on a regular basis. He was also one of the few students who diligently attended the class in person (the course was made a hybrid course due to the COVID-19 situation.) I consequently had many opportunities to interact face-to-face (well, mask-to-mask) with him in and after class. And we did that a lot: he often followed up after class or in office hours with additional questions that were notably thoughtful and sophisticated. It was an enormous pleasure to interact with him. And true to form for our most talented Columbia students, many of his interventions caused me to revisit some of my own characterizations of doctrinal points in the course.

Given the high expectations that his in-class presentation created, it was not terribly surprising when Mr. Molis submitted a very strong exam in the class. As I reviewed his exam for purposes of writing this letter, it is clear that he had and displayed considerable mastery of the subject, particularly in the written portion of the exam. (He does not know this, but his A- missed out on an ordinary A by a hair's breadth.)

So impressed was I with Mr. Molis' performance in class and in the exam that I asked him to become a research assistant starting this past January. His work has been exemplary. Not only does he pay attention to detail in ways that matter (a lot), but he delivers in a timely, mistake-free, and thoughtful manner with each task I give him.

I have had several opportunities to interact with Mr. Molis in other settings, and I am constantly impressed by his warm and engaged personality. I have grown to like and admire him quite a bit. I expect great things from this student, and I hope that those great things will start in your chambers.

I close by reiterating my enthusiastic recommendation for Mr. Molis, and I urge you to give his application serious consideration. Feel free to contact me if you have any questions about this outstanding candidate and promising clerk.

Sincerely,

Eric L. Talley
Sulzbacher Professor of Law

Eric Talley - etalley@law.columbia.edu

Columbia
Law School

Alexandra B. Carter
Clinical Professor of Law
Chair, Clerkship Committee

435 West 116th Street, Box D-6
New York, NY 10027
T 212-854-3365 M 646-660-0627
acarte1@law.columbia.edu

Re: Recommendation for Cameron Molis' Clerkship Application

Dear Judge:

If I could, I would hire Cameron Molis immediately for a tenure-track position at Columbia Law School. Instead, I write today to urge you to hire him as your judicial clerk.

I am a Clinical Professor of Law at Columbia Law School, where I serve as Director of the Mediation Clinic and Chair of the Law School's Clerkship Committee. Because I am in a unique position to be able to comment on Cam's academic work as well as his skills and abilities as a colleague, I will address each in turn below.

By way of background: I selected Cam as one of ten students for my Spring 2020 Mediation Clinic, in which he mediated cases in a variety of New York State courts, as well as Federal Sector cases for the Administrative Law Judges of the Equal Employment Opportunity Commission New York Office. Cam was my strongest student, and indeed, one of the very strongest I've had in my 13 years of teaching. I awarded him Dean's Honors, reserved only for the top student in the class, in the absence of any grades. Cam went on to lead my Advanced Mediation Clinic in Fall 2020 and Spring 2021, where he has been indispensable both to our research and our practice.

In the Mediation Clinic classroom, Cam impressed me immediately as an extremely strong student with very sharp analytical abilities. His writing is clear and tight, his research manages to be quick as well as thorough, and he assimilates academic materials into his practice at the fastest rate I have seen. While some students at Columbia can execute perfectly on any research task, Cam goes well beyond – he immediately gets the larger picture import of the research, and I can always count on him to advise me on whether we are asking the right question. This semester, I tasked Cam with leading a large research team in executing a qualitative research study on the potential business development effects of a specific negotiation skill. I can count on one hand the number of students I've had since I started Columbia to whom I could have handed this project with such confidence. His performance has been flawless.

Cam's work in the field is also among the very best I have ever seen. From his first moment in the mediation room, he paired a preternatural level of skill with the kind of keen professional judgment that is very hard for even veteran clinical professors to teach. Put simply, he has the rare combination of intellectual horsepower and emotional intelligence to be a skilled SDNY mediator right now, as a 3L. In fact, Cam's mediation practice has been so impressive that I recently pulled him onto a SDNY case and co-mediated it with him. Between his analysis of the cases in counsel's briefs, and his terrific advice on how to get the best results from mediation, both sides told me they

could not believe they were dealing with a student. Cam has also facilitated substantive CLE workshops at the United Nations, the EDNY, NYSBA and the ABA Dispute Resolution Section, handling questions and comments from senior judges, lawyers and mediators with aplomb.

Put simply: Cam is a top-flight mediator, writer, researcher, facilitator, team leader and colleague. I would hire him in a heartbeat, I would call any colleague or friend and tell them to hire him, and I would not hesitate to trust him with any project or case.

Finally, as you will see if you meet him (and I hope you will!), Cam is a loyal, hard-working person who supports his teammates in every activity—an important quality for a judicial clerk working in a small office. He is an incredibly empathic, devoted colleague. People truly love working with him. He would make an excellent interpersonal addition to any chambers.

I write many clerkships letters every year. To date, I have not written a stronger letter than this one. I sincerely hope that you will consider Cam for a judicial clerkship in your chambers, and I would be more than pleased to offer you any additional information about him that might assist in your decision. Please feel free to contact me anytime on my personal cellphone at (646) 660-0627, or by email at acarte1@law.columbia.edu.

Sincerely,

Alexandra B. Carter

Clinical Professor of Law
Chair, Clerkship Committee
Columbia Law School

Columbia Law School
435 West 116th Street
New York, NY 10027

March 10, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Cameron ("Cam") Molis

Dear Judge Liman:

I write to enthusiastically support the application of Cameron ("Cam") Molis -- a Columbia Law School 3L (Class of 2021) -- to be your law clerk. He is whip smart and effective and would doubtlessly do extraordinary work in your chambers.

I got to know Cam in his 2L year, when he took the Sentencing Seminar I teach with Judge Richard Sullivan (formerly SDNY, now CA2). The seminar uses the post-Booker regime as a vehicle for exploring jurisdiction-spanning criminal sentencing issues. But we also look hard at classic federal sentencing issues like the use of fraud-loss and narcotics-weight metrics and child pornography guidelines.

Cam was a standout contributor, speaking with impressive care and analytic sophistication, and always with careful consideration of, and respect for, what others had said. His level of preparation and engagement was outstanding. He also wrote an excellent final paper about the experimentation, by a handful of district judges, with polling jurors for sentencing recommendations. Cam thoughtfully analyzed the validity and efficacy of this practice as a means to better anchor federal sentencing in community sentiment, and used it as a lens to more generally explore sentencing reform experimentation. He writes exceedingly well, with graceful prose and cogent analysis. Pandemic grading prevented Judge Sullivan and me from giving letter grades, but Cam would have done very well indeed.

During his 3L year, Cam took my large Criminal Adjudication class and was a true stand-out. Teaching hybrid classes is always a challenge, but I could count on Cam for trenchant comments, or answers to questions, that invariably advanced class discussion. He knew the blackletter law cold, but had also thought about larger issues of equity and efficacy. He wrote a very strong exam as well, ending with an A- in the course. Cam's performance was of a piece with his performance in other courses, as his transcript has only a handful of grades below A-.

While my interactions with Cam were on the criminal side of the curriculum, and he is leaning toward doing a stint as a prosecutor, his interests and talents are not so confined. In addition to his work on the Human Rights Law Review, where he has been Managing Editor, Cam worked up his Note -- on how states can, without pre-emption by the Federal Arbitration Act, ease bargaining inequalities with their own statutory regimes -- for publication in the University of Pennsylvania Journal of Law & Social Change. That Cam took the initiative to reach out to another law school's publication, and that the publication thought this piece by an outsider student worthy of publication are testament to Cam's energy, scholarly talent, and his enormous intellectual range. It's also worth noting that, last summer (when Sullivan & Cromwell gracefully gave its summer associates pay without work), Cam did terrific work for Dan Capra -- the Reporter to the FRE Advisory Committee -- on circuit splits and even proposed a change to FRE 615(b). Cam tells me that his undergraduate work in Classics at Columbia College honed his attention to linguistic detail and helped prepare him for legislative drafting. And that sounds quite plausible. (He's also working hard to keep his Latin and Ancient Greek skills from rusting.)

As a person, Cam is mature and impressively sane, with a lovely sense of humor and no sharp edges. I think you'd like him a lot and am confident he'd be a terrific law clerk. If there is anything else I can add, please give me a call.

Respectfully yours,

Daniel Richman

Dan Richman - drichm@law.columbia.edu - 212-854-9370

CAMERON MOLIS
243 West 98th Street, Apt. 2E, New York, NY 10025
(914) 584-6318 • c.molis@columbia.edu

WRITING SAMPLE

This writing sample has been excerpted from an article recently published in the University of Pennsylvania Journal of Law and Social Change. It has been lightly edited during the publication process and is being used with the permission of the journal.

The full piece proposes a method for states to combat mandatory arbitration's steady erosion of employee and consumer adjudicatory rights. It begins with a survey of the legal and policy background of mandatory arbitration in the United States and analyzes the Ninth Circuit's emerging interpretation of the Federal Arbitration Act that would grant states the power to regulate arbitration without fear of federal preemption. The interpretation is then compared against nationwide precedent and is scrutinized for its viability outside of the Ninth Circuit. If this understanding of the Federal Arbitration Act continues to proliferate and inspire robust legislation, states can foster meaningful accountability by providing consumers and employees transparent dispute resolution practices and a revived ability to aggregate small-dollar claims.

This excerpt focusses on my legal analysis of the Ninth Circuit's "complexity distinction" and provides bracketed headings for any sections from the full version that have been removed for the sake of brevity. The full version of the article is available at 24 U. PA. J.L. & SOC. CHANGE, 411 (2021).

CURBING *CONCEPCION*: HOW STATES CAN EASE THE STRAIN OF PREDISPUTE ARBITRATION TO COUNTER CORPORATE ABUSERS

CAMERON MOLIS*

[This is an excerpt of an article published at 24 U. PA. J.L. & SOC. CHANGE, 411 (2021)]

I. INTRODUCTION

Vanina Guerrero, a former partner at global law firm DLA Piper, is barred from facing her credibly accused abuser in court.[1] Due to a predispute arbitration clause in her employment agreement, Ms. Guerrero's claims of repeated sexual assault by a direct supervisor cannot proceed publicly through the court system.[2] Instead, any claim filed would be diverted into opaque and practically unreviewable arbitration proceedings against her will, with any facts uncovered or outcomes reached being shielded from public view.[3] In response to these restrictive employment terms, Ms. Guerrero published an open letter demanding that DLA Piper "[r]elease [her] from forced arbitration and allow [her] to assert [her] civil claims for assault, battery, sexual harassment and retaliation in our transparent court system."[4] The firm suspended her the following week.[5]

---

* J.D., Columbia Law School, 2021. B.A., Columbia University, 2016. Thanks are due to Professors Carol Liebman and Mark Barenberg for providing insightful feedback and for encouraging me to seek publication. I also thank the members of the People's Parity Project for drawing my attention to Vanina Guerrero's story.

[1] *See DLA Piper Hit by Law Student Protests over Arbitration*, BLOOMBERG LAW (Oct. 10, 2019, 2:15 P.M.), https://news.bloomberglaw.com/business-and-practice/dla-piper-offices-hit-by-law-student-protests-over-arbitration [https://perma.cc/VH5F-EW8P].

[2] *See id.* These sexual misconduct claims were echoed by the similar experiences of a human resources manager, an administrative assistant, and a professional responsibility counsel with the same managing partner. *See* Dan Packel, *Ex-DLA Piper Ethics Counsel Alleges Firm Tolerated 'Abuse of Power' by Ousted Partner*, AM. LAW. (Oct. 23, 2019, 1:32 PM), https://www.law.com/americanlawyer/2019/10/23/ex-dla-piper-ethics-counsel-alleges-firm-tolerated-abuse-of-power-by-ousted-partner/ [https://perma.cc/KGL7-XZM6]; Dan Packel, *Third Accuser Files EEOC Claim About Former DLA Piper Partner*, AM. LAW. (Nov. 7, 2019, 5:05 PM), https://www.law.com/americanlawyer/2019/11/07/third-accuser-files-eeoc-claim-about-former-dla-piper-partner/ [https://perma.cc/A6B8-XA2Y]; Ross Todd, *Second Woman Files EEOC Claim About Former DLA Piper Partner*, THE RECORDER (Oct. 21, 2019, 6:58 PM), https://www.law.com/therecorder/2019/10/21/second-woman-files-eeoc-claim-about-former-dla-piper-partner/ [https://perma.cc/RX5Q-6XR8].

[3] *See* Ramona L. Lampley, *"Underdog" Arbitration: A Plan for Transparency*, 90 WASH. L. REV. 1727, 1733 (2015) (acknowledging the "general criticism that arbitration is simply not transparent", and noting that "[m]ost arbitration disputes do not result in published opinion . . ."); Stephen Wills Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 889 (2010) ("Generally, parties are bound by the decisions of arbitrators, and courts may not review arbitrators' findings of fact or conclusions of law.").

[4] Open Letter from Vanina Guerrero to Roger Meltzer and Jay Rains, Co-Chairs, DLA Piper 2 (Oct. 2, 2019), https://src.bna.com/LOo [https://perma.cc/M2V4-577Y].

[5] Braden Campbell, *DLA Piper, Ex-Practice Leader Face New Sex Bias Charge*, LAW360 (Oct. 21, 2019, 5:06 P.M.), https://www.law360.com/articles/1211782/dla-piper-ex-practice-leader-face-new-sex-bias-charge [https://perma.cc/7M5C-JUK2]; *see also* Lizzy McLellan & Dan Packel, *DLA Piper Removes Female Partner Who Alleged Sex Assault, Triggering 'Smear Campaign' Accusation*, AM. LAW. (Oct. 16,

Vanina Guerrero's situation is far from unique: an estimated 60.1 million American workers are barred from accessing the court system in actions implicating their employer, including over half of the country's nonunion, private sector employees.[6] This figure also does not begin to account for the number of American consumers bound by similar arbitration agreements when purchasing goods or services.[7]

In the consumer context, companies implement arbitration provisions to guard against anything from disputes over credit installment plans to internet sweepstakes,[8] and consumers can be bound by these agreements by just browsing a retailer's website.[9] From credit card services to transportation companies, these agreements prevent consumers from using the court system to be made whole.[10]

2019, 11:58 AM), https://www.law.com/americanlawyer/2019/10/16/dla-piper-removes-female-partner-who-alleged-sex-assault-triggering-smear-campaign-accusation/ ("The firm . . . in its statement, emphasized that the allegations against her are completely unrelated to her own allegations against Lehot.") [https://perma.cc/G5WH-KQ9Y].

[6] *See* ALEXANDER J.S. COLVIN, ECONOMIC POLICY INSTITUTE, THE GROWING USE OF MANDATORY ARBITRATION 2 (2018), https://www.epi.org/files/pdf/144131.pdf [https://perma.cc/F6QG-7C9Q] (extrapolating from data showing that 56.2% of American private-sector nonunion employees are bound by forced arbitration proceedings, with 53.9% of nonunion private-sector employers and 65.1% of companies with over 1,000 employees having such procedures).

[7] *See* Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019) ("At least a majority of the households in the United States (and possibly almost two-thirds) are covered by broad consumer arbitration agreements."); Press Release, Consumer Reports, Groups Launch Nationwide Effort to Stop Use of Binding Mandatory Arbitration Clauses (Feb. 24, 2005), https://advocacy.consumerreports.org/press_release/consumer-groups-call-for-end-to-use-of-binding-mandatory-arbitration-clauses/ [https://perma.cc/BNK7-2T4Q] ("There is probably not a single adult in the United States who is not subject to at least one binding mandatory arbitration clause – and most are subject to many."); *see also* Jeremy B. Merrill, *One-Third of Top Websites Restrict Customers' Right to Sue*, N.Y. TIMES: THE UPSHOT (Oct. 23, 2014), https://www.nytimes.com/2014/10/23/upshot/one-third-of-top-websites-restrict-customers-right-to-sue.html [https://perma.cc/2J93-FXZE] (discussing the use of arbitration agreements by "one-third of top websites").

[8] *See* Szalai, *supra* note 7, at 239 (citing Amazon, Walmart, Home Depot, and Lowe's as companies mandating arbitration for consumer claims and noting the broad range of consumer transactions covered by arbitration clauses).

[9] Reading the terms of service in software and user agreements is a practice that few, if any, consumers can or do take seriously, despite the massive consequences involved. *See* DELOITTE, 2017 GLOBAL MOBILE CONSUMER SURVEY: US EDITION 12 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf [https://perma.cc/7GUY-KWJA]; Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2256, 2277–79 (2019) (using the Flesch Reading Ease test and the Flesch-Kincaid test to determine that the typical readability of online terms of service is equivalent to that of "articles found in academic journals" and therefore "unlikely to be understood by consumers"); *see also* Merrill, *supra* note 7 (examining the prevalence of "clickwrap" and "browsewrap" agreements in online terms of service).

[10] *See, e.g.*, *Apple Card Customer Agreement*, GOLDMAN SACHS 16, https://www.goldmansachs.com/terms-and-conditions/Apple-Card-Customer-Agreement.pdf [https://perma.cc/MNH7-596D] (including a confidentiality provision establishing that "[the parties] agree that any arbitration proceedings initiated hereunder shall be kept confidential") (last visited Feb. 13, 2021); Sam Mintz, *Amtrak's New*

When an Amtrak train careened off its track and killed eight passengers in 2015, the resulting lawsuit filed on behalf of those passengers and their survivors resulted in a $265 million settlement paid out by the company.[11] Five years later, Amtrak added an arbitration clause to every purchased ticket preventing passengers killed or injured while traveling from suing in court.[12] If this 2015 crash were to happen today, passengers and their survivors could not use the public court system to seek relief for their injuries and damages, and Amtrak would remain free from the threat of damaging depositions or any public revelations of wrongdoing.[13]

This Article explores how states may hold the key to limiting the excesses of mandatory predispute arbitration clauses and proposes solutions to a problem afflicting millions of Americans like Vanina Guerrero. Part II outlines the primary criticisms of mandatory arbitration and examines the current statutory and judicial framework regulating the practice. Part III analyzes how a Ninth Circuit interpretation of the Federal Arbitration Act (FAA) could expand the power of states to rein in aggressive arbitration provisions and assesses this interpretation's viability against nationwide precedent. Finally, Part IV proposes a guide for leveraging this interpretation to vindicate the rights of exploited workers and consumers, concluding by advocating for legislation up to the hilt of state authority to combat the significant abuses left unchecked by current law.

II. Arbitration in America and the Legal Limits to State Intervention

A. Arbitration's Asymmetric Justice

[Part II(A) outlines some of the policy arguments surrounding arbitration.]

B. Reimagining Federal Preemption in the Arbitration Arena

[Part II(B)(1) details the history of the FAA and explains how the Supreme Court in *AT&T Mobility LLC v. Concepcion* interpreted the statute to preclude a state rule which forbade arbitration clauses from limiting class proceedings.]

2. The Ninth Circuit's complexity distinction

In a pair of arbitration decisions decided after *Concepcion*, the Ninth Circuit has upheld state rules regulating arbitration in a manner they hold accords with both the FAA and Supreme Court Precedent. While acknowledging the fact that class protections within arbitration are no

---

Ticket Rules Won't Let Passengers Sue in a Crash, Politico (Nov. 8, 2019, 5:35 P.M.), https://www.politico.com/news/2019/11/08/amtrak-crash-sue-068175 [https://perma.cc/5LP8-8BH9].

[11] *See* Mintz, *supra* note 10.

[12] *See Terms and Conditions*, Amtrak (Jan. 31, 2021), https://www.amtrak.com/terms-and-conditions.html#arbitrationAgreement-arbitrationAgreement [https://perma.cc/6VYH-KHYJ]; *see also* Mintz, *supra* note 10 (explaining that this arbitration clause is "unusually broad and detailed" and describing the detail with which Amtrak waives civil liability).

[13] *See Amtrak Cannot Force Passengers to Agree to Arbitration, Lawsuit Says*, Pub. Citizen (Jan. 7, 2020), https://www.citizen.org/news/amtrak-cannot-force-passengers-to-agree-to-arbitration-lawsuit-says/ [https://perma.cc/9KSN-XB2N] ("Had its forced arbitration provision been in place at the time, the victims and their families would not have been able to use the courts to hold Amtrak accountable.").

longer viable after *Concepcion*,[14] the Ninth Circuit has preserved plaintiffs' right to bring Private Attorney General Act ("PAGA") actions and public injunctions against corporations.[15] Under California law, a private attorney general action authorizes employees to recover civil penalties on behalf of themselves, other employees, and the state for violations of California's labor code.[16] This type of action allows multiple employees to recover from the same defendant through a single action. Similarly, under California law, a claim for a public injunction permits a single plaintiff to enjoin defendants engaging in unlawful acts that threaten the public as a whole.[17] Both types of claims provide viable checks against corporate abuse, and in the view of the Ninth Circuit, are beyond the reach of restrictive arbitration agreements.

In *Sakkab v. Luxottica Retail North America, Inc.*, Shukri Sakkab brought a PAGA claim in California state court against his employer, alleging the company unlawfully withheld wages from him and his fellow employees.[18] Although the arbitration agreement signed by all employees forbade the use of "representative actions," the Ninth Circuit held that a California state court rule invalidating such waivers did not frustrate the purposes of the FAA and was therefore not preempted.[19]

Distinguishing this case from *Concepcion*, the Ninth Circuit explained that, while *procedural* complexity inherent in class action procedures may frustrate the purposes of arbitration under the FAA, complexity flowing from the *substance* of a claim itself does not frustrate arbitration in the same way.[20] In *Sakkab*, the court contrasted PAGA claims and other substantively complex actions like antitrust claims with procedurally complex class actions.[21] The substantive complexity in PAGA actions, the court found, comes from the manner in which the defendant's liability is measured, while the procedural complexity in class actions comes from the need to protect the due process rights of absent parties.[22] Accordingly, the court permitted this employee-

[14] *See* Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 433 (9th Cir. 2015) (conceding that the Court in *Concepcion* held that the FAA preempted the California rule making class waivers unenforceable).

[15] *See id.* at 440 ("We have held that the waiver of Sakkab's representative PAGA claims may not be enforced."); Blair v. Rent-A-Center, Inc., 928 F.3d 819, 830–31 (9th Cir. 2019) (holding that the FAA does not preempt the California rule making waivers of the right to seek a public injunction unenforceable).

[16] Dep't of Indus. Rels., State of California, *Private Attorney General Act (PAGA) – Filing* (Dec. 2020), https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html [https://perma.cc/Y3QL-Q4PC].

[17] *See* McGill v. Citibank, N.A., 393 P.3d 85, 89 (Cal. 2017) (distinguishing between private injunctive relief "that primarily 'resolve[s] a private dispute' between the parties and 'rectif[ies] individual wrongs', and that benefits the public, if at all, only incidentally" and public injunctive relief "that 'by and large' benefits the general public and that benefits the plaintiff, 'if at all,' only 'incidental[ly]' and/or as 'a member of the general public'") (citations omitted) (quoting Broughton v. Cigna Healthplans, 988 P.2d 67, 76 (Cal. 1999)).

[18] 803 F.3d 425, 428 (9th Cir. 2015).

[19] *Id.* at 431–33; *see* Iskanian v. CLS Transportation Los Angeles, LLC, 327 P.3d 129, 149 (Cal. 2014).

[20] *Sakkab*, 803 F.3d at 438.

[21] *Id.* at 437–38; *see also id.* at 435 ("The class action is a procedural device for resolving the claims of absent parties on a representative basis. By contrast, a PAGA action is a statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer.") (citations omitted).

[22] *Id.* at 438, 442 ("[T]he potential complexity of PAGA actions is a direct result of how an employer's liability is measured under the statute. The amount of penalties an employee may recover is measured by

protecting provision to survive the weight of *Concepcion* and set a precedent for allowing state arbitration rules to survive federal preemption.

Four years later, the Ninth Circuit decided a similar case pertaining to public injunctive relief in the consumer arbitration context. In *Blair v. Rent-A-Center, Inc.*, Paula Blair sought a public injunction to prevent Rent-A-Center from extorting consumers through rent-to-own contracts in violation of California state law.[23] Although the plaintiff was bound by an arbitration agreement forbidding her from seeking relief that would affect other Rent-A-Center account holders, the Ninth Circuit found a California Supreme Court rule declaring such waivers unenforceable to not be preempted by the FAA.[24]

Citing *Sakkab*, the Ninth Circuit applied the same substantive versus procedural complexity distinction and found that any complexity resulting from public injunctive relief flowed from type of substantive complexity found in PAGA claims and not the procedural complexity found in class actions.[25] Accordingly, the court extended *Sakkab*'s holding and its carve-out from *Concepcion* to public injunctive relief and consumer arbitration.

Against the backdrop of Supreme Court precedent preserving the power of employers, companies, and their arbitration agreements, the Ninth Circuit's recent holdings may look like momentary aberrations. But in spite of the odds, the carefully crafted legal arguments in *Sakkab* and *Blair* appear to conform with the language of the FAA and *Concepcion* and could spark a revolution in employee and consumer arbitration jurisprudence if adopted by courts nationwide.

[Part II(C) acknowledges the limits to alternative legislative and grassroots solutions and concludes that state action has the greatest chance of curbing the excesses of arbitration.]

III. The Viability of the Complexity Distinction

While the Ninth Circuit's interpretation of the FAA and *Concepcion* presents an attractive avenue for states looking to combat forced arbitration without risking federal preemption, success in other circuits will depend on bringing arguments in line with nationwide precedent. This Part begins in Section III.A by evaluating the complexity distinction's compatibility with two Supreme Court decisions relied on by the Ninth Circuit in *Sakkab* and *Blair*. Section III.B then incorporates related decisions issued after the Ninth Circuit's development of this interpretation, examining whether they may further complicate the analysis. Finally, Section III.C expands to federal precedent nationwide and assesses the interpretation's likelihood of adoption in other circuits.

A. The Complexity Distinction Is Consistent with Supreme Court Precedent

1. Concepcion's application of FAA preemption specifically targets procedural complexity

The Ninth Circuit's *Sakkab* and *Blair* decisions maintain that the FAA only preempts laws that increase the *procedural* complexity of arbitration, like the one mandating class action

---

the number of violations an employer has committed, and the violations may involve multiple employees. . . . '[C]lass arbitration *requires* procedural formality.' For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.") (citation omitted) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 349 (2011)).

[23] Blair v. Rent-A-Center, Inc., 928 F.3d 819, 822–23 (9th Cir. 2019).

[24] *Blair*, 928 F.3d 822; *see also* McGill v. Citibank, N.A., 393 P.3d 85, 93 (Cal. 2017).

[25] *Blair*, 928 F.3d at 828.

protections in *Concepcion*, and not those that may increase the *substantive* complexity of arbitration, like rules forbidding contractual restriction of PAGA claims in *Sakkab* or public injunctive relief in *Blair*. This assertion is both a reasonable interpretation of *Concepcion*'s view of FAA preemption, and was directly contemplated in *Conception* itself.

Given that *Concepcion* ultimately pertains to a question of federal preemption of state law, it is necessary to examine how the case frames the FAA's preemptive power. In *Concepcion*, the Court proposes a two-step analysis to evaluate FAA preemption.[26] First, a court must determine whether the state law is eligible for protection under the FAA's savings clause by identifying whether it is a "generally applicable contract defense."[27] A law would fail this step if it were found to target arbitration directly.[28] Second, the court evaluates whether the law is applied in a manner that disfavors arbitration.[29] This determination is largely based on whether a law stands as an obstacle to the FAA's objective of facilitating informal, streamlined proceedings.[30]

In order for the Ninth Circuit's distinction between substantive and procedural complexity to conform with *Concepcion*'s view of FAA preemption, substantively complex claims must pass the second step of this analysis by not obstructing the FAA's interest in efficient proceedings.[31] In *Concepcion*, the Court presents three additional factors to determine if class protections obstruct the purposes of the FAA, whether: (i) the law will sacrifice the informality of arbitration by making it slower and more costly, (ii) the law increases the procedural formalities required at arbitration, and (iii) the law causes an increased risk to the defendant.[32] While the Court in *Concepcion* found that laws mandating the right to class action procedures failed on all three points,[33] laws creating only substantive complexity will likely fare better under the same analysis.

---

[26] *See* Lisa Tripp & Evan R. Hanson, AT&T v. Concepcion: *The Problem of a False Majority*, 23 KAN. J.L. & PUB. POL'Y 1, 6 (2013) (discussing how Justice Scalia's majority opinion in *Concepcion* first addresses rules that prohibit arbitration and are clearly preempted, and then turns to the more difficult issue of facially neutral rules that frustrate the purposes of the FAA).

[27] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

[28] *Id.* at 341; *see, e.g.*, *Casarotto*, 517 U.S. at 687 (holding the FAA preempted a Montana statute because the law "condition[ed] the enforceability of arbitration agreements on compliance with a . . . requirement not applicable to contracts generally"); Perry v. Thomas, 482 U.S. 483 (1987) (reversing a California state court decision that relied on a state law allowing plaintiffs to disregard arbitration agreements when bringing actions to collect wages); Ferguson v. Corinthian Colls., Inc., 733 F.3d 928 (9th Cir. 2013) (reversing a decision that exempted all claims of public injunctive relief from arbitration).

[29] *See Concepcion*, 563 U.S. at 341.

[30] *See id.* at 344. The Court specifically poses two hypotheticals to explain this step of the analysis: (i) a state rule demanding arbitration contain judicially-monitored discovery, and (ii) a state rule demanding arbitration include a final decision by a jury (or as Scalia proposes, "a panel of twelve lay arbitrators"). *Id.* at 341–42. These two scenarios would not be explicitly aimed at arbitration, but their effects would have a disproportionate impact on such procedures. *See id.* at 342.

[31] *See id.* at 348–51; *contra* Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 441–42 (9th Cir. 2015) (Smith, J., dissenting).

[32] *Concepcion*, 563 U.S. at 348–51.

[33] *See id.* The breadth of the Court's holding has engendered significant dissent from commentators. *See, e.g.*, Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights? – Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systemic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800 – 2015*, 25 B.U. PUB. INT. L.J. 143, 225 (2016) ("[T]he *Concepcion* Court's conclusions are not well grounded in sound or statistically significant evidence. . . . [E]ven if simple

When the Court in *Concepcion* discussed how class protections make arbitrations slower and more costly, it specified that such procedures require an arbitrator to decide whether the class should be certified, whether the named parties were sufficiently representative of the broader class, and how discovery for the class should be conducted.[34] The substantively complex PAGA claims at issue in *Sakkab*, however, have none of the same procedural requirements mandated by Rule 23 for class actions.[35] The dissenting opinion in *Sakkab* argues that, nevertheless, the substantively complex PAGA claims still increase the procedural formalities required at arbitration and slow the process by requiring an arbitrator to make fact-intensive judgments about absent parties.[36] The same argument could be made against *Blair's* claims for public injunctive relief in which a defendant must account for the money obtained from consumers and notify these consumers of their statutory rights.[37]

The difference between these claims and the class procedures addressed in *Concepcion* is that any added complexity in substantively complex claims is introduced after the arbitrator has already ruled on the legal questions at issue.[38] Any added complexity for the arbitrator in PAGA and public injunctive disputes is limited to determining the remedial actions required of the defendant. This distinction is important because *Concepcion* is specifically focused on how the disruption of arbitration's bilateral nature—the fact that it is adjudicated between just two parties—distorts the objectives of the FAA.[39] Both PAGA claims and claims for public injunctive relief

---

percentages were powerful predictors, the reported percentages and statistically significant bivariate relationships in the present study do not support the *Concepcion* Court's general conclusion."); Tripp & Hanson, *supra* note 74, at 2 (arguing that Justice Thomas's concurrence in *Concepcion* rejects the second step of Scalia's preemption analysis, therefore depriving the Court of a majority behind the reasoning of its holding).

[34] *Concepcion*, 563 U.S. at 348.

[35] *See Sakkab*, 803 F.3d at 436 ("In a PAGA action, the court does not inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees. . . . Moreover, unlike Rule 23(a), PAGA contains no requirements of numerosity, commonality, or typicality.").

[36] *See id.* at 444–46 (Smith, J., dissenting) (explaining that the arbitrator would need to determine the number of parties affected by the labor code violation and the number of pay periods during which they were affected).

[37] *See* Blair v. Rent-A-Center, Inc., 928 F.3d 819, 823 (9th Cir. 2019) ("Plaintiffs seek a 'public injunction' on behalf of the people of California to enjoin future violations of these laws, and to require that Rent-A-Center provide an accounting of monies obtained from California consumers and individualized notice to those consumers of their statutory rights.").

[38] *Compare Concepcion*, 563 U.S. at 349 ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class."), *with Blair*, 928 F.3d at 830 (demonstrating that the responsibility of arbitrators to consider the interests of the public as a whole is not unique to public injunctions because arbitrators routinely consider such interests when issuing private injunctions), *and Sakkab*, 803 F.3d at 438 ("[T]he potential complexity of PAGA actions is a direct result of how an employer's liability is measured under the statute. The amount of penalties an employee may recover is measured by the number of violations an employer has committed, and the violations may involve multiple employees.").

[39] *See Concepcion*, 563 U.S. at 348 ("[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.").

maintain the bilateral nature of arbitration and therefore do not sacrifice informality or increase procedural formality in the manner envisioned by the majority in *Concepcion*.[40]

Because the stakes of an arbitration vary across claims and contexts, it is difficult to imagine that the Court's remaining point regarding the level of risk to defendants can carry much weight on its own. While not addressed directly in *Blair*, the *Sakkab* court responded to this concern by contending that state protections for remedies cannot be preempted solely on the level of risk they may pose to defendants.[41] Further, the Ninth Circuit suggests that parties can always prospectively decide to litigate high-stakes claims as many do in the antitrust context.[42] While this argument is internally consistent on its own, it is further supported by Supreme Court precedent establishing that arbitration agreements do not bar substantive rights afforded by statutes.[43]

2. The complexity distinction is necessary to reconcile Supreme Court precedent

The Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*[44] places an important limitation on *Concepcion*. In this case, the Supreme Court held that parties entering into agreements to arbitrate statutory claims do not forgo the substantive rights afforded by those statutes.[45] According to the Court, an agreement to arbitrate does nothing more than move a claim from a judicial to an arbitral forum, trading the additional procedures of a courtroom for the simplicity of arbitration.[46] In light of this holding, *Concepcion*'s preemption analysis must be limited and cannot be deployed in a manner that would deny a party's substantive rights provided by law.[47] In the context of the laws at issue in *Sakkab* and *Blair*, this means that the guarantees to pursue PAGA claims and public injunctive relief cannot be eliminated through FAA preemption.

---

[40] *See Blair*, 928 F.3d at 829 ("Crucially, arbitration of a public injunction does not interfere with the bilateral nature of a typical consumer arbitration."); *Sakkab*, 803 F.3d at 436 ("Nothing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims.").

[41] *See Sakkab*, 803 F.3d at 437 ("[T]he FAA would not preempt a state statutory cause of action . . . merely because the action's high stakes would arguably make it poorly suited to arbitration."). The court specifically cites *Medtronic, Inc. v. Lohr* in arguing that concepts of federalism lead to the presumption that "Congress does not cavalierly pre-empt state-law causes of action." *Id.* (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). Similarly, the court cites *Booker v. Robert Half Int'l, Inc.* where it was assumed that a term in an arbitration agreement barring punitive damages was not enforceable. *Id.* (citing Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 83 (D.C. Cir. 2005)).

[42] *Id.* at 437–38.

[43] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[44] *Id*. at 614.

[45] *Id.* at 628.

[46] *Id.*

[47] Although the Court in *Concepcion* contends that the FAA preempts state laws that interfere with its objective of facilitating informal, streamlined proceedings, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011), the Court in *Mitsubishi* ensures that this preemption cannot limit a plaintiff's right to pursue substantive statutory rights. *See Mitsubishi*, 473 U.S. at 628. It must be noted, however, that the Ninth Circuit does not agree with this argument and has indicated support for Justice Kagan's dissenting view in Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 252 (2013) (Kagan, J., dissenting), that *Mitsubishi* does not apply to state statutes. Ferguson v. Corinthian Colls., Inc., 733 F.3d 928, 936 (9th Cir. 2013). Despite this disagreement, a majority of the Court in *Italian Colors* treated *Mitsubishi* as applying to state as well as federal statutes. *Italian Colors*, 570 U.S. at 238 (stating that in *Concepcion*, a case involving a state statute, the Court "specifically rejected the argument that class arbitration was necessary

Even if the Court in *Concepcion* did not contemplate a distinction between substantive and procedural complexity itself, a limitless application of FAA preemption would veer too close to upsetting the holding in *Mitsubishi*, which has been specifically endorsed in cases following *Concepcion*.[48] As the Court in *Mitsubishi* stated, "potential complexity should not suffice to ward off arbitration,"[49] and arbitrators are sufficiently competent adjudicators to consider and manage substantively complex cases.

Between a straightforward reading of *Concepcion* and the need to harmonize *Concepcion* and *Mitsubishi*, the Ninth Circuit's safe harbor for substantively complex claims appears to be a fair interpretation of Supreme Court precedent. However, in order for the complexity distinction in *Sakkab* and *Blair* to remain viable across all federal courts, it is necessary that it accords with Supreme Court precedent decided after these Ninth Circuit cases.

B. The Complexity Distinction Is Consistent with Post-Concepcion Jurisprudence

1. Epic Systems has no measurable effect on Sakkab

While some commentators and courts have speculated that the Supreme Court case *Epic Systems Corp. v. Lewis*[50] may cast doubt on the Court's acceptance of the Ninth Circuit's complexity distinction, their arguments fail to do more than appeal to the Court's favorable view of arbitration.[51] In *Epic Systems*, the Court interpreted the National Labor Relations Act (NLRA) to not guarantee a right to class and collective action in arbitration proceedings.[52] The Court employed several canons of statutory construction to determine that there was no right in the NLRA that would cause it to conflict with the FAA.[53] In an order from the Southern District of California, the judge inquired as to whether *Sakkab* remained good law after *Epic Systems* and whether the California law in *Sakkab* may be preempted by the FAA, as the NLRA was in *Epic*

---

to prosecute claims 'that might otherwise slip through the legal system'" and therefore applied the analysis in *Mitsubishi* to a state statute) (quoting *Concepcion*, 563 U.S. at 351).

[48] *See Italian Colors*, 570 U.S. at 236 ("[The *Mitsubishi* exception to arbitration enforceability] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.").

[49] *Mitsubishi*, 473 U.S. at 633.

[50] 138 S. Ct. 1612 (2018).

[51] *See, e.g.*, Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After* Epic*,* New Prime*, and* Lamps Plus, 56 AM. BUS. L.J. 815, 845 (2019). Note, however, that this article does not give a specific reason why the Ninth Circuit's interpretation would be at risk after *Epic Systems*, except for a broad argument concerning the Court's favorability toward arbitration. *Id.*

[52] *Epic Sys.*, 138 S. Ct. at 1628.

[53] *See, e.g.*, *id.* at 1626–27 (explaining that Congress "does not . . . hide elephants in mouseholes"); *id.* at 1630 (arguing that courts should resist reading conflicts into statutes).

Systems.[54] Other courts within the circuit disagreed with this assessment, with one opinion calling the Southern District's argument "conclusory" and "unpersuasive."[55]

The Ninth Circuit gave a conclusive answer to its view of *Epic Systems*'s effect on *Sakkab* when it returned to its complexity distinction in *Blair*. The court distinguished *Epic Systems* from the case at hand by concluding that the bilateral nature of arbitration remains undisturbed by the substantive right to seek public injunctive relief.[56] The court did not comment directly on *Epic Systems*'s potential impact on *Sakkab*, but seeing as the court treated *Sakkab*'s complexity distinction as good law,[57] the opinion implied a lack of conflict.

In *Blair*, the defendant had alleged a conflict between *Sakkab* and *Epic Systems*, arguing that the Supreme Court remained hostile to rules that interfere with enforcing the terms of an arbitration agreement.[58] In a similar manner to the Southern District of California,[59] the defendant failed to give a further explanation for why these two cases were specifically incompatible.[60]

In sum, *Epic Systems* does not seem to pose any additional challenge to the Ninth Circuit's complexity distinction beyond strengthening the assumption that the Supreme Court will uphold the terms of most arbitration agreements. While the Court's affection for arbitration is manifestly apparent, there does not appear to be a strong legal argument that *Epic Systems* conflicts with the holdings of either *Sakkab* or *Blair*.

[Part III(B)(2) surveys various petitions for certiorari and concludes that the complexity distinction has not itself been challenged by parties seeking further review.]

C. The Complexity Distinction Is Consistent with Most Nationwide Precedent

1. The Eastern District of Pennsylvania's decision Joseph v. Quality Dining, Inc. is inapposite

While the Ninth Circuit's complexity distinction seems to align with Supreme Court precedent issued both before and after the cases where it was developed,[61] an obstacle to the interpretation's nationwide proliferation may have arisen in the unique caselaw of the Eastern District of Pennsylvania. In *Joseph v. Quality Dining, Inc.*, the District Court suggested that the substantive versus procedural rights distinction may not be an impactful element of the FAA's preemption analysis.[62] The court determined that *Mitsubishi* does not guarantee that arbitration agreements cannot eliminate a plaintiff's ability to pursue a substantive right. Instead, the court viewed *Mitsubishi's* language that agreements to arbitrate do not cause a party to forgo substantive

---

[54] *See* McGovern v. United States Bank N.A., 362 F. Supp. 3d 850, 862 n.5 (S.D. Cal. 2019). ("If a federal law . . . that applies regardless of the existence of an arbitration provision does not implicate the FAA's saving clause to avoid preemption, presumably a state law . . . that applies regardless of the existence of an arbitration provision does not implicate the saving clause either.").
[55] *See* Echevarria v. Aerotek, Inc., No. 5:16-CV-04041-BLF, 2019 WL 2503377, at *4 (N.D. Cal. June 17, 2019).
[56] Blair v. Rent-A-Center, Inc., 928 F.3d 819, 829 (9th Cir. 2019).
[57] *See id.* at 825 ("The Supreme Court's decision in *Concepcion* and our decision in *Sakkab* guide our analysis. Indeed, our decision in *Sakkab* all but decides this case.").
[58] *See* Reply Brief for Rent-A-Center at 7, *Blair*, 928 F.3d 819 (No. 17-17221).
[59] *See McGovern*, 362 F. Supp. 3d at 862 n.5.
[60] *See* Reply Brief for Rent-A-Center, *supra* note 107, at 10.
[61] *See supra* Sections III.A–.B.
[62] 244 F. Supp. 3d 467, 474 (E.D. Pa. 2017).

rights as a merely descriptive statement as opposed to a mandatory instruction.[63] This would mean that the Court in *Mitsubishi* was commenting on a trend in arbitration agreements instead of dictating how they must operate.

If the District Court is correct that *Mitsubishi* does not guarantee plaintiffs' ability to pursue statutorily granted substantive rights, the FAA's preemptive power of state laws would go unchecked, and any rule that guaranteed substantive or procedural rights would likely be preempted if it led to any increased complexity in arbitration. This would make the Ninth Circuit's distinction between substantive and procedural complexity inapplicable, as all forms of complexity would now put state regulation of arbitration at risk of preemption.

It seems likely, however, that further review should overturn *Joseph*. The decision has generated little to no scholarly discussion, and this passage specifically has not been cited in any subsequent case.[64] Further, it conflicts directly with Supreme Court precedent that acknowledges plaintiffs' "right to pursue" statutory remedies.[65] If the substantive complexity of statutory claims could put their statutes at risk of preemption, the decision to arbitrate would have a direct impact on plaintiffs ability to pursue a claim, in direct contrast to the Court's directive in *Mitsubishi*. A plaintiff attempting to cite the Ninth Circuit's complexity distinction in the Eastern District of Pennsylvania may have some difficulty in distinguishing *Joseph*, but *Joseph*'s conflict with *Mitsubishi* makes it highly unlikely that a future judge would uphold the case if challenged.[66]

2. Support for the distinction is found in the pre-Epic Systems circuit split

While the Eastern District of Pennsylvania is unique in concluding that the distinction between substantive and procedural rights has little impact on a preemption analysis under the FAA, the potential for other jurisdictions to adopt the Ninth Circuit's distinction between substantive and procedural rights may depend on a previous circuit split that culminated in *Epic Systems*. Recall that this case held that the NLRA does not guarantee a right to class and collective action in arbitration proceedings.[67]

When this case was heard by Seventh Circuit Court of Appeals, the defendant argued that, if the NLRA guaranteed a right to collective action, it was a procedural rather than a substantive right, and therefore could not interfere with the FAA's mandate to enforce a predispute arbitration clause barring class proceedings.[68] The Seventh Circuit rejected this argument, and held that the right to collective action was, in fact, a substantive right because it was at the heart of the remedy

---

[63] *See id.* ("It is unreasonable to take the simple recognition that a party's substantive rights afforded by a statute may be equally enforced through court or arbitration and turn it into a key point of analysis mandating that 'substantive rights' as a category may not be affected by an agreement to arbitrate").
[64] The few cases that do cite to this decision do not specifically rely on its rejection of the substantive versus procedural complexity distinction.
[65] *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–38 (2013) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985)).
[66] For a broader discussion on the interplay between the substantive and procedural aspects of federal law, *see generally* Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH U. L. REV. 1027, 1032–33 (2013) (exploring a growing trend of courts using cloaking efforts to target social ends with substantive consequences through restrictions on mechanisms of procedure; a phenomenon arguably occurring in many of the arbitration decisions discussed in this Article).
[67] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1628 (2018); *see supra* Section III.B.1.
[68] Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1160 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612.

that Congress was attempting to provide through the statute.[69] On review, the Supreme Court did not address whether the right to collective action was per se procedural or if it could be substantive, and what effect this distinction may have. Instead, the Court held that the right to class proceedings did not exist in the NLRA at all.[70] On remand, the questions of whether the right to class proceedings is substantive or procedural was not taken up again, and the case was dismissed.[71]

In the wake of *Epic Systems*, many circuits have yet to determine whether the right to pursue a claim on behalf of a collective group in laws other than the NLRA is a substantive or a procedural right. Before *Epic Systems*, circuit courts were divided on this question. The Second and Fifth Circuits held that the right to proceed on behalf of others was a mere procedural right,[72] while the Ninth and Seventh Circuits, as well as the NLRB, held that the right is substantive.[73] As *Epic Systems* did not settle this issue, the prior dividing lines between circuits may influence whether courts will view the right to have arbitration affect absent parties (as it does in PAGA and public injunction claims) to be a procedural right creating procedural complexity or a substantive right creating substantive complexity. This is very close to the issue in *Sakkab* and *Blair*, and if PAGA or public injunction statutes are tested in these circuits, these previous lines may predict the disparate results.

The Second and Fifth Circuits, which have held that the right to a collective action is a procedural right, examined the concept of these rights in the abstract, without considering whether the substantive or procedural nature of the rights may be dependent on the different laws they were contained within.[74] By contrast, the Ninth Circuit, Seventh Circuit, and the NLRB looked at each statute individually and differentiated those where the use of collective action was a substantive right from those where it was a mere procedural device.[75] The Seventh Circuit explains this distinction succinctly in saying, "just because [a] . . . right is associational does not mean that it is

---

[69] *Id.*

[70] *See Epic Sys.*, 138 S. Ct. at 1628; Greene & O'Brien, *supra* note 100, at 823.

[71] *See* Lewis v. Epic Sys. Corp., No. 15-CV-82-BBC, 2019 U.S. Dist. LEXIS 11937, at *2 (W.D. Wis. Jan. 24, 2019).

[72] *See* Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.6 (2d Cir. 2013) ("We have previously explained that the procedural 'right' to proceed collectively presupposes, and does not create, a non-waivable, substantive right to bring such a claim."); D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 357 (5th Cir. 2013) ("The use of class action procedures, though, is not a substantive right.").

[73] *See* Morris v. Ernst & Young, LLP, 834 F.3d 975, 986 (9th Cir. 2016) ("The rights established in § 7 of the NLRA—including the right of employees to pursue legal claims together—are substantive. They are the central, fundamental protections of the Act . . . ."); *Lewis*, 823 F.3d at 1160 ("The right to collective action in section 7 of the NLRA is not, however, merely a procedural one. It instead lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute."); D.R. Horton, Inc., 357 N.L.R.B. 2277, 2286 (N.L.R.B. Jan. 3, 2012) ("The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.").

[74] *See D.R. Horton, Inc.*, 737 F.3d at 357 ("For example, the Supreme Court has determined that there is no substantive right to class procedures under the Age Discrimination in Employment Act despite the statute providing for class procedures. Similarly, numerous courts have held that there is no substantive right to proceed collectively under the FLSA . . . .") (citations omitted); *Sutherland*, 726 F.3d at 297 (citing the same Supreme Court precedent).

[75] *See Lewis*, 823 F.3d at 1161 ("It bears repeating: just as the NLRA is not Rule 23, it is not the ADEA or the FLSA. While the FLSA and ADEA allow class or collective actions, they do not guarantee collective process.").

not substantive. It would be odd indeed to consider associational rights, such as the one guaranteed by the First Amendment to the U.S. Constitution, non-substantive."[76] This means that the Seventh Circuit believed there was a right to proceed collectively in the NLRA, and the fact that this right was associational did not require it to be procedural. If courts in this circuit follow this reasoning, it is likely they view the right to proceed on behalf of others in PAGA and public injunction statutes to be substantive and therefore sheltered from the threat of FAA preemption under the Ninth Circuit's reasoning.

It bears repeating that when the Supreme Court took up these cases, it did not determine whether the right to collective action was or was not substantive, only that such a right was not guaranteed in the NLRA[77] Therefore, there is reason to believe that this circuit split could play a significant role in future applications of PAGA or public injunction statutes. For those that view such a right to be substantive, adoption of the Ninth Circuit's reasoning in *Sakkab* and *Blair* and the resulting protection for state laws curtailing arbitration appears likely.

[PART IV proposes a series of potential state laws that could protect PAGA claims, preserve rights to public injunctions, and eliminate restrictive confidentiality provisions.]

V. CONCLUSION

While the prevalence of arbitration agreements seems inevitable for the foreseeable future, legislative protections can and must be implemented at the state level to counter their worst abuses. In the absence of bipartisan support for federal legislation and the limited reach of direct action, state legislatures have the greatest capacity to stem the tide of arbitration in America and to restore the promise of just restitution to a class of mistreated workers and consumers.

The Ninth Circuit has offered a cure to a decade of detrimental judicial decisions and a blueprint for building a new generation of safeguards against rising corporate power and abuse. The complexity distinction is a logically sound and easily exported analysis that is compatible with arbitration jurisprudence in many jurisdictions. States have already shown that they are eager to intervene to combat excessive arbitration, but they must draft careful and precise legislation to ensure a lasting impact. The Ninth Circuit's cabined view of FAA preemption provides a guide to crafting legislation that accurately harnesses the power of the disparate, mistreated majority of which Vanina Guerrero is so emblematic; a majority that seeks to counter and expose a pattern of commercial misconduct that might otherwise proceed unabated.

[76] *Id.* at 1161.
[77] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1628 (2018).

Applicant Details

First Name	**Silvia**
Middle Initial	**D**
Last Name	**MORENO**
Citizenship Status	**U. S. Citizen**
Email Address	**sdmoreno@uchicago.edu**
Address	**Address** Street **5220 S Drexel Ave, 412** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**9546070533**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 4, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Ben-Shahar, Omri
omri@uchicago.edu
773-702-9494
Hallett, Nicole
nhallett@uchicago.edu
773-702-9611
Barry, Patrick
barrypj@umich.edu
734-763-2276

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Danny Moreno
954.607.0533
sdmoreno@uchicago.edu

May 2, 2022

The Honorable Judge Lewis J. Liman
United States District Court for the Southern District of New York

Dear Judge Liman,

I am a third-year law student at the University of Chicago Law School and a Topic Access Editor for the *University of Chicago Law Review*. I am applying for a clerkship in your chambers for the 2023 term. I am particularly interested in the opportunity to experience litigation from the court's perspective, help shape the direction of the law, and grow as a legal professional under your mentorship.

I am confident that I will make a meaningful contribution to the Southern District of New York's chambers. As a summer associate for the Litigation Practice Group at Kirkland & Ellis, I was able to hone in on my legal writing to assist in litigating precedent-setting cases. I have continued this work during the school year as a 3L Law Clerk, completing a series of legal memorandum supporting ongoing cases. This year, I am also gaining legal experience through UChicago's Poverty and Housing Law Clinic, leading client intake calls, presenting cases to all of the attorneys in Legal Aid Chicago's Housing Practice Group during case acceptance meetings, and conducting legal research relevant to our cases. As a Topic Access Editor for the *Law Review*, I get to engage closely with legal scholarship and support my peers as they wrote scholarship of their own.

My background in research will allow me to support the important work of your chambers. As a research assistant to Professor Benjamin Lessing at the Program on Political Violence, I synthesized data from over 1,000 news articles into a comprehensive database. I also conducted reports on countries of interest, researching the prevalence of gangs in cities throughout Latin America. With my support, the research project grew from being a two person endeavor to include a post-doctoral researcher as well as six undergraduate researchers. I balanced work weeks ranging from 15 to 40 hours alongside my full-time undergraduate studies and ultimately wrote my undergraduate thesis based on my research; this paper was awarded "Best Undergraduate Paper" at the Midwest Political Science Association's 2019 Conference.

As a first-generation immigrant that identifies as non-binary, I understand the vital role of mentorship in building a career. As the Co-President of the University of Chicago Latinx Law Students Association (LLSA), I expanded our mentorship program to provide incoming 1Ls with alumni and 2L mentors. The initiative received significant support from our 2L class, which allowed the program to flourish. Having seen the importance of mentorship, both in my own career trajectory and through LLSA's expanded mentorship program, I aspire to receive mentorship from you to gain insight on building an impactful legal career.

Please find my application materials, including my resume, transcript, and writing sample, enclosed. Letters of recommendation will arrive under separate cover. Additionally, my Contracts professor offered to serve as a reference and would be delighted to communicate with you if that would be helpful. He can be reached at 773-702-2087 or omri@uchicago.edu.

Respectfully,

Danny Moreno
Pronouns: They/Them

DANNY MORENO

sdmoreno@uchicago.edu • 954.607.0533 • 5220 S. Drexel Ave., Apt. 412, Chicago, IL 60615

EDUCATION

The University of Chicago Law School — Chicago, IL
Juris Doctor — June 2022
Honors: *The University of Chicago Law Review* (Topic Access and Recruitment Editor)
Activities: Latinx Law Students Association (President); California Law Students Association (2L Representative); Impact Initiative (Secretary); Chicago Law Foundation (Merchandise VP); OutLaw (Member)

The University of Chicago — Chicago, IL
Bachelor of Arts with Honors in Public Policy and Geographic Science — June 2019
Thesis project: *Identifying Patterns of Criminality and the Logics of Violence*
Honors: National Merit Scholar; Best Undergraduate Paper - Midwest Political Science Association; Dean's List '15-19

PROFESSIONAL EXPERIENCE

Kirkland & Ellis LLP — Los Angeles, CA
2L Diversity Fellow — June 2021 – Present
- Outlined claims and defenses under New Mexico law for determining client strategy in multidistrict litigation
- Researched Iowa's Supreme Court Justices' positions on state-level administrative deference doctrines
- Prepared closing argument for simulated wrongful death trial judged by firm partners

Vinson & Elkins LLP — Houston, TX
1L Diversity Fellow — June 2020 – July 2020
- Researched precedent on the limits of riparian rights in a lease dispute on appeal to the Fifth Circuit
- Traced the legislative and jurisprudential history of the Nationwide Permit program to understand its purpose and identify potential challenges to its current interpretation
- Drafted the argument section of a successful motion to reopen in support of a pro bono client's asylum proceedings, highlighting a prejudicial error that persuaded the lower court judge to reopen the case sua sponte

Program on Political Violence, Chicago Project on Security & Threats (CPOST) — Chicago, IL
Research Assistant to Benjamin Lessing — March 2016 – June 2020
- Managed an event-level database on the expansion of Brazilian prison gangs, coordinating a team of 6 undergraduate researchers that recorded over 3,000 attacks and discovered trends in state-gang interactions
- Presented findings at the Midwest Political Science Association's 2019-2020 conference, receiving a best-in-class award out of over 50 finalists

Center for Identity + Inclusion, University of Chicago — Chicago, IL
Building Manager — October 2019 – June 2020
- Provided institutional support for over 60 events tailored toward marginalized students to encourage resource access and community building
- Mentored 8 students affiliated with the Center in their career planning efforts and post-graduate applications

MAPSCorps — Chicago, IL
Lead Field Coordinator — June 2019 – August 2019
- Managed a team of 3 field coordinators and 12 high school students to collect data from 200+ small businesses
- Proposed development initiatives for our client, the Brighton Park Neighborhood Council, using our survey data
- Strengthened students' project management skills to meet client deadlines and showcase findings at MAPSCorps' symposium, where our team was recognized for producing the lowest error rates out of 11 teams

Wanxiang Group Corporation — Hangzhou, China
Wanxiang Fellow — June 2017 – August 2017
- Engaged with the Department of State's 100,000 Strong Initiative, a fully-funded cultural exchange program that strengthens relationships between research institutions across the globe
- Presented a self-directed research project on the effects of government subsidies in China's electric vehicle market

SKILLS & INTERESTS

Skills: Fluent in Spanish and Portuguese; beginner in French
Interests: Salsa and bachata dancing, dystopian fiction, day hiking

How to Authenticate This Official PDF Transcript

This official PDF transcript has been transmitted electronically to the recipient, and is intended solely for use by that recipient. It is not permissible to replicate this document or forward it to any person or organization other than the identified recipient. Release of this record or disclosure of its contents to any third party without written consent of the record owner is prohibited.

This official transcript has been digitally signed and therefore contains special characteristics. This document will reveal a digital certificate that has been applied to the transcript, and for optimal results, we recommend that this document is viewed with the latest version of Adobe® Acrobat or Adobe® Reader. This digital certificate will appear in a pop-up screen or status bar on the document, display a blue ribbon, and declare that the document was certified by University of Chicago, with a valid certificate issued by GlobalSign CA for Adobe®. This document certification can be validated by clicking on the Signature Properties of the document.

The Blue Ribbon Symbol: The blue ribbon is your assurance that the digital certificate is valid, the document is authentic, and the contents of the transcript have not been altered.

Invalid: If the transcript does not display a valid certification and signature message, reject this transcript immediately. An invalid digital certificate display means either the digital signature is not authentic, or the document has been altered. The digital signature can also be revoked by the transcript office if there is cause, and digital signatures can expire. A document with an invalid digital signature display should be rejected.

Author Unknown: Lastly, one other possible message, Author Unknown, can have two possible meanings: The certificate is a self-signed certificate or has been issued by an unknown or untrusted certificate authority and therefore has not been trusted, or the revocation check could not complete. If you receive this message make sure you are properly connected to the internet. If you have a connection and you still cannot validate the digital certificate on-line, reject this document.

The current version of Adobe® Reader is free of charge, and available for immediate download at http://www.adobe.com.

THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Silvia Daniela Moreno
Student ID: 10456732

Scott C. Campbell, University Registrar

University of Chicago Law School

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 06/15/2019
Degree Honors: With General Honors
Public Policy Studies (B.A.) With Honors
Geographical Sciences (B.A.)

Academic Program History

Program: Law School
Start Quarter: Autumn 2019
Program Status:Active in Program
J.D. in Law

External Education

Pompano Beach High School
Pompano Beach, Florida
Diploma 2015

EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

Beginning of Law School Record

Autumn 2019

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law William Baude	3	3	178
LAWS	30211	Civil Procedure I Emily Buss	3	3	177
LAWS	30311	Criminal Law Genevieve Lakier	3	3	178
LAWS	30611	Torts Saul Levmore	3	3	177
LAWS	30711	Legal Research and Writing Patrick Barry Ryan Sakoda	1	1	183

Winter 2020

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Richard Mcadams	3	3	178
LAWS	30411	Property Lior Strahilevitz	3	3	EP
LAWS	30511	Contracts Omri Ben-Shahar	3	3	EP
LAWS	30611	Torts Saul Levmore	3	3	177
LAWS	30711	Legal Research and Writing Patrick Barry Ryan Sakoda	1	1	183

Spring 2020

Course		Description	Attempted	Earned	Grade
LAWS	30221	Civil Procedure II William Hubbard	3	3	EP
LAWS	30411	Property Lior Strahilevitz	3	3	EP
LAWS	30511	Contracts Douglas Baird	3	3	EP
LAWS	30712	Lawyering: Brief Writing, Oral Advocacy and Transactional Skills Ryan Sakoda	2	2	EP
LAWS	54303	Racism, Law, and Social Sciences Christopher Fennell	3	3	EP

Summer 2020

Honors/Awards
The University of Chicago Law Review, Staff Member 2020-21

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	45701	Trademarks and Unfair Competition Omri Ben-Shahar	3	3	181
LAWS	53308	Food Law Omri Ben-Shahar	3	3	176
LAWS	53497	Editing and Advocacy Patrick Barry	2	2	P
LAWS	53498	Presence: Performance Skills for Lawyers Paul Marchegiani	2	2	179
LAWS	63612	Workshop: Constitutional Law Bridget Fahey Farah Peterson	1	1	178
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Date Issued: 04/23/2022

THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Silvia Daniela Moreno
Student ID: 10456732

Scott C. Campbell, University Registrar

University of Chicago Law School

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence Emily Buss	3	3	173
LAWS	45801	Copyright Saul Levmore	3	3	176
LAWS	53287	Technology Policy Randal Picker	3	3	179
LAWS	63612	Workshop: Constitutional Law Bridget Fahey Farah Peterson	1	1	178
LAWS	81002	Strategies and Processes of Negotiation George Wu	3	3	178
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	42301	Business Organizations Saul Levmore	3	3	176
LAWS	43203	Advanced Issues in Delaware Corporate Law William Chandler	1	1	175
LAWS	53324	Advanced Interpretation: Law and Language Thomas Lee	3	3	177
LAWS	63612	Workshop: Constitutional Law	1	1	178
Req Designation:		Meets Writing Project Requirement Bridget Fahey Farah Peterson			
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

Summer 2021

Honors/Awards
The University of Chicago Law Review, Topic Access & Recruitment Editor 2021-22

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	43284	Professional Responsibility and the Legal Profession Anna-Maria Marshall	3	3	174
LAWS	46101	Administrative Law Jennifer Nou	3	3	177
LAWS	53271	Intensive Contract Drafting Workshop Emily Underwood Michelle Drake	3	3	177
LAWS	81009	Intensive Trial Practice Workshop Herschella Conyers Erica Zunkel Judith Miller Craig Futterman Jorge Alonso	3	3	177
LAWS	92000	Greenberg Seminars: Race and Capitalism Daniel Abebe Aziz Huq	0	0	

Winter 2022

Course		Description	Attempted	Earned	Grade
BUSN	38122	Diversity in Organizations Jane Risen	3	3	B
LAWS	91301	Poverty and Housing Law Clinic Lawrence Wood	3	0	
LAWS	92000	Greenberg Seminars: Race and Capitalism Daniel Abebe Aziz Huq	0	0	
NEHC	30019	Mesopotamian Law Martha T Roth	3	3	P

End of University of Chicago Law School

Date Issued: 04/23/2022

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website: http://registrar.uchicago.edu.

Revised 09/2016

THE UNIVERSITY OF CHICAGO

Name: Silvia Daniela Moreno
Student ID: 10456732

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 06/15/2019
Degree Honors: With General Honors
Public Policy Studies (B.A.) With Honors
Geographical Sciences (B.A.)

Academic Program History

Program: The College
Start Quarter: Summer 2015
Current Status: Discontinued
Chicago Academic Achievement Program

Program: The College
Start Quarter: Autumn 2015
Current Status: Completed Program
Public Policy Studies (B.A.)
Geographical Sciences (B.A.)

External Education

Pompano Beach High School
Pompano Beach, Florida
Diploma 2015

Test Credits

Test Credits Applied Toward Bachelor's Degree

	Earned
Totals:	900

Beginning of Undergraduate Record

Autumn 2015

Course		Description	Attempted	Earned	Grade
CHEM	11100	Comprehensive General Chemistry-I	100	100	B-
HEBR	10101	Elementary Classical Hebrew-1	100	100	A-
HUMA	14000	Reading Cultures-1	100	100	B+
HUMA	19100	Humanities Writing Seminars	0	0	P
MATH	15300	Calculus-3	100	0	W

Undergraduate

Winter 2016

Course		Description	Attempted	Earned	Grade
BIOS	11140	Biotechnology for the 21st Century	100	100	A
HEBR	10102	Elementary Classical Hebrew-2	100	100	A-
HUMA	14100	Reading Cultures-2	100	100	A
HUMA	19100	Humanities Writing Seminars	0	0	P
PLSC	26800	Insurgency, Terrorism, and Civil War	100	100	A-

Spring 2016

Course		Description	Attempted	Earned	Grade
ECON	19800	Introduction To Microeconomics	100	100	A
HEBR	10103	Elementary Classical Hebrew-3	100	100	A-
PLSC	22913	The Practice of Social Science Research	100	100	A-
PLSC	29500	Drugs, Guns, and Money: The Politics of Criminal Conflict	100	100	A

COLLEGE LANGUAGE REQUIREMENT COMPLETED

Honors/Awards
DEAN'S LIST 2015-16

Autumn 2016

Course		Description	Attempted	Earned	Grade
HMRT	10100	Human Rights in World Civilizations 1	100	100	B+
PBPL	20000	Economics for Public Policy	100	100	A-
PBPL	22100	Politics and Policy	100	100	A
SOSC	11200	Power, Identity, Resistance-2	100	100	A-

Winter 2017

Course		Description	Attempted	Earned	Grade
HMRT	10200	Human Rights in World Civilizations II	100	100	A-
PBPL	22200	Public Policy Analysis	100	100	A
SOSC	11100	Power, Identity, Resistance-1	100	100	A-

Spring 2017

Course		Description	Attempted	Earned	Grade
HUMA	14200	Reading Cultures-3	100	100	A
HUMA	19100	Humanities Writing Seminars	0	0	P
PBPL	26400	Quantitative Methods in Public Policy	100	100	A-
SOSC	11300	Power, Identity, Resistance-3	100	100	A-
STAT	22000	Stat Meth And Applications	100	100	B+

Honors/Awards
DEAN'S LIST 2016-17

Autumn 2017

Course		Description	Attempted	Earned	Grade
CMSC	16100	Honors Intro To Comp Sci-1	100	100	C-
LACS	23511	Memory, Reconciliation, and Healing: Transitional Justice	100	100	B+
PBPL	26301	Field Research Project in Public Policy	100	100	A

Winter 2018

Course		Description	Attempted	Earned	Grade
PBPL	22300	Policy Implementation	100	100	A
PBPL	27809	Violence in the Early Years	100	100	A
PHSC	12400	The Chemistry of Big Problems	100	100	A

Date Issued: 11/16/2019

THE UNIVERSITY OF CHICAGO

Name: Silvia Daniela Moreno
Student ID: 10456732

Undergraduate

Spring 2018

Course		Description	Attempted	Earned	Grade
BUSN	30000	Financial Accounting	100	100	B+
ENST	27150	Urban Design with Nature: Assessing the Social and Natural Realms in the Calumet Region	100	100	A
ENST	27221	Sustainable Urbanism	100	100	A
ENST	27325	Urban Ecology in the Calumet Region	100	100	A

Honors/Awards
DEAN'S LIST 2017-18

Autumn 2018

Course		Description	Attempted	Earned	Grade
ARTH	17504	Art in Chicago	100	100	A
GEOG	24700	Introduction to Urban Planning	100	100	A
GEOG	28202	Geographic Information Science I	100	100	A
PBPL	29800	BA Seminar: Public Policy I (credit)	100	100	A

Winter 2019

Course		Description	Attempted	Earned	Grade
GEOG	22101	Changing America in the Last 100 Years	100	100	A
GEOG	29800	Senior Seminar: Geog Studies	100	100	A
PBPL	29801	BA Seminar: Public Policy II (no credit)	0	0	A
PBPL	29900	BA Paper Preparation: Public Policy	100	100	A

Spring 2019

Course		Description	Attempted	Earned	Grade
CMLT	27450	Stateless Imaginations: Global Anarchist Literature	100	100	A
GEOG	22700	Urban Structure and Process	100	100	B+
PBPL	24901	Trade, Development and Poverty in Mexico	100	100	A-

Honors/Awards
DEAN'S LIST 2018-19

Undergraduate Career Totals

Cumulative GPA:	3.728	Cumulative Totals	4300	4200

Milestones

Language Competency
Status: Completed
Program: Bachelor's Degree
Date Completed: 09/26/2016
Milestone Level: Language Competency
Date Attempted: 09/26/2016 Completed

End of Undergraduate

Date Issued: 11/16/2019

THE UNIVERSITY OF CHICAGO

Name: Silvia Daniela Moreno
Student ID: 10456732

Law School

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 06/15/2019
Degree Honors: With General Honors
Public Policy Studies (B.A.) With Honors
Geographical Sciences (B.A.)

Academic Program History

Program: Law School
Start Quarter: Autumn 2019
Current Status: Active in Program
J.D. in Law

External Education

Pompano Beach High School
Pompano Beach, Florida
Diploma 2015

End of Law School

Date Issued: 11/16/2019

Professor Omri Ben-Shahar
Leo and Eileen Herzel Professor of Law and
Kearney Director of the Coase-Sandor Institute for Law and Economics
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
omri@uchicago.edu | 773-702-2087

May 03, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing to offer an enthusiastic recommendation for Danny Moreno, who applied for a position as a law clerk. I taught Moreno two classes—a 1L contract law class and an upper-class Trademarks course—and in both Moreno towered above other students. Danny is absolutely a superb candidate with unique skills for a top clerkship.

The first episode that stands out in my mind is Danny Moreno's performance in the 1L Contracts course that took place during the early Covid lock-down and was subject to the mandatory Pass/Fail grading scale. The quality of the exams many of the students in that class wrote was mediocre, far below the standard of years past. Admittedly, many students had to endure difficult emotional and other pressures, and I know with some detail the particular hardship and challenges Moreno endured. And yet, some students (not many) did manage to rise and demonstrate through their intense preparation and well-written exams sides of their intellect and character that go beyond the quantitative grade achievements. Moreno represents some of the best among that small group of self-motivated students, who worked hard and performed well without any grade reward. I regard this as a signal of integrity and motivation. Unbeknownst to the students, I gave all the exams "shadow grades" which do not appear in students' records, and I base this recommendation letter, in part, on Moreno's brilliant yet undocumented performance as a 1L.

Moreno then took Trademarks with me, as a 2L, and again shined. At that time, I got to know and appreciate Danny's writing skills more closely. What an exceptional writer! Some of our best students write clearly, convincingly, or analytically. But few, if any, display all these attributes, as Moreno does. Moreno seems to have a gift for good writing—alas, an increasingly rare commodity—and appears to do it with great ease. There are many ways to write intelligently, and I particularly appreciate Danny's gift to write concisely, without repetition or surplusage, while keeping the reader interested and curious. How often do you come across a student memo that not only conveys the ideas with crystal clarity and tight structure but also reveals that its writer had fun and ease writing it?

I am certain that Moreno will be an excellent clerk. Brilliance, seriousness, quick thinking, care, resourcefulness in conducting research, and strong work ethic—Moreno has it all. Growing up in a family who had to flee Colombia and resettle in the United States, Moreno is a self-made star, a National Merit Scholar, a leader in the community, and a budding attorney who, I expect, will advocate for great causes in the future.

It is not my habit to comment on non-professional aspects of my students' profiles, in part because I don't truly know them as individuals, and I would hate to load my letters with puffery. But I deviate from this habit in writing the present letter, because I think that Danny Moreno is a special person, with enormous integrity, grit, and warmth. Of course, these are not the primary reasons I recommend her; I think Moreno will be a superb clerk. But I also believe that the judge for whom Moreno will work would value the brilliant personality and demeanor. It will be an absolute pleasure to mentor Danny Moreno.

Sincerely,

Omri Ben-Shahar

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

1111 East 60th Street | Chicago, Illinois 60637
PHONE 773-702.9611 | FAX 773-702-2063
E-MAIL nhallett@uchicago.edu
www.law.uchicago.edu

Nicole Hallett
Associate Clinical Professor of Law

May 3, 2022

The Honorable Lewis J. Liman
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

Re: Clerkship Recommendation Letter for Danny Moreno

I write this recommendation on behalf of Danny Moreno for a clerkship in your chambers. I have known Danny in two different contexts during her time as a student at the University of Chicago Law School. First, I supervised Danny's substantial writing project last year. Second, I was Danny's trial team supervisor during the Intensive Trial Practice Workshop in September 2021.

Danny's substantial writing project asked whether the theory of cultural capture could explain certain adjudicatory trends in immigration courts and whether, as a result, we should construe the jurisdiction-stripping provisions of 8 U.S.C. § 1252 narrowly. Immigration law is notoriously complex and it requires one to understand various aspects of the whole system in order to understand any one particular aspect. Danny came in with very little background in immigration law and quickly managed to get up to speed on a number of different statutory provisions as well as twenty-five years of confusing, contradictory case law. Danny's final paper was well written and researched, and contributed to scholarly debate.

I was able to observe Danny's lawyering skills as her supervisor in the Intensive Trial Practice Workshop. As part of this course, student teams conduct an entire simulated trial from beginning to end including doing opening statements, motions in limine, witness examinations, expert qualifications, and closing arguments. Danny handled the opening statement and several witness examinations. I supervised Danny the whole week of the trial and saw how Danny prepared for the trial diligently and ably. Danny's opening statement was well written and delivered, and Danny's witness examinations, though not without their hiccups, were artfully handled. The

volunteer jury ended up returning a verdict for Danny's client and Danny received high scores on her performance. Because I am not one of the primary instructors in the course, I am not aware of what grade Danny ultimately received because Danny's participation in the trial was only one part of the grade. However, I was very impressed with Danny's performance.

Through both of these experiences, Danny showed a number of different skills that would be useful as a law clerk: the ability to work quickly to understand a new area of law, the ability to synthesize case law, the importance of diligently preparing for something until you are extra prepared, and the ability to think on your feet. I have no doubt that Danny would make an excellent law clerk and I give her my highest recommendation.

Sincerely,

Nicole Hallett
Associate Clinical Professor of Law

NH/z

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
625 South State Street
Ann Arbor, Michigan 48109-1215

Patrick Barry
Clinical Assistant Professor of Law
Director of Digital Academic Initiatives
Visiting Lecturer (University of Chicago Law School)

May 03, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I've known Sylvia ("Danny") Moreno, who goes by "they/them," since their very first days at the University of Chicago Law School. Danny impressed me then, and Danny continues to impress me now. They're an imaginative problem solver. They're a thorough researcher. And best of all, they're an absolutely delightful person to collaborate with. I'm going to miss working with them after they graduate.

I'm not the only one who feels this way. Judging by the wonderful things Danny's classmates say, a whole bunch of other people are going to miss working with Danny too. Here, for example, is what one of Danny's partners in a negotiation course shared with me via email:

Danny exhibited a strong team-oriented ethic throughout our project and helped lead our efforts on the memorandum part of the assignment. In addition to nailing their own part, Danny helped strengthen everyone else's parts as well. Danny's generosity, writing ability, and overall inclusiveness made working with Danny a pleasure.

A law student who has been friends with Danny since college had similarly glowing things to say, particularly about Danny's skills as a writer:

Danny has always been a strong writer, and I have only seen the quality of their writing improve over the years. Having edited a number of Danny's papers in the past, I can say with confidence that Danny is consistently clear and concise. The topics of Danny's papers tend to be nuanced and explore the legal complexities of the topic at hand, but the engaging writing style makes the information very easy to understand and digest.

The student added that Danny is a "go-getter and a passionate leader in the University of Chicago community," qualities that I certainly noticed during my time there as a visiting faculty member. For example, in the "Editing and Advocacy" course Danny took with me, I could always count on them to get the discussion going and offer encouraging comments to other students, many of whom would then participate more confidently and enthusiastically.

I even started intentionally pairing Danny with more reticent students when it came time for group exercises, hoping that Danny's social warmth and willingness to contribute would be contagious. It, I'm happy to report, always was.

For all of these reasons and plenty more I'd be happy to share if you'd like to give me a call on my cell phone (585.690.3337), I highly recommend you consider Danny for a spot in your chambers. If you are looking for a clerk who is at once gifted, rigorous, kind, funny, generous, and insightful, you've found the perfect candidate.

Sincerely,

Patrick Barry
Clinical Assistant Professor of Law
Director of Academic Initiatives

DANNY MORENO

sdmoreno@uchicago.edu • 954.607.0533 • 5220 S. Drexel Ave., Apt. 412, Chicago, IL 60615

The following memorandum evaluates whether potential clients Jason Thomas and Ramya Mandava have adequately alleged an injury in fact for purposes of Article III standing. I drafted this writing sample for my legal research course during Winter Quarter 2020.

According to the fact pattern, RegionEats, an app-based food delivery service, compromised users' personal identifying information. Thomas worked for RegionEats as a delivery driver and Mandava uses RegionEats' platform as a customer; both Thomas and Mandava's personal information was disclosed to unauthorized parties due to a bug in the RegionEats app. I assess whether these unauthorized disclosures satisfy the elements of an injury in fact.

MEMORANDUM
ATTORNEY WORK PRODUCT

TO: Roseanna Jones-Sakoda
FROM: Silvia Daniela Moreno
DATE: February 18, 2020
RE: Theories of injury in fact for Mandava and Thomas' claims against RegionEats

QUESTION PRESENTED

Jason Thomas and Ramya Mandava would like to bring a common-law suit against RegionEats in the Southern District of New York for negligence in handling their personal information due to a glitch in the RegionEats app that disclosed sensitive information to other users. This memo considers only whether Mandava and Thomas suffered an injury in fact that confers Article III standing.

BRIEF ANSWER

A court would likely find that Mandava's unreimbursed credit card charge and the time spent contesting fraudulent charges satisfy the injury-in-fact requirement. Thomas' claims would likely be too speculative to satisfy the "actual or imminent" element of an injury in fact.

FACTS

RegionEats, an app providing food delivery services, released an update on June 1, 2019 with a glitch that allowed drivers to see their customers' credit card information and PINs while customers saw their driver's personal identifying information ('PII'), including their Social Security number, birth date, address, phone number, and bank account information. The glitch remained uncorrected for 26 hours. On June 5, 2019, RegionEats informed users of the glitch and

mentioned that an ongoing internal investigation revealed no evidence that malicious actors had accessed users' data. *Mem.* at 1-2.

Jason Thomas works as a driver with RegionEats. During the glitch, eight customers had access to his PII. As of January 13, 2020, he has not experienced identity theft, but he now monitors his bank account activity more closely and has purchased one year of credit monitoring and identity-theft protection for $350. *Mem*. at 2.

Ramya Mandava, a RegionEats customer, had her credit card information and PIN number exposed to two drivers during the glitch. In November 2019 she discovered three fraudulent charges to her credit card. Mandava only recovered the value of the second and third fraudulent charges, but not the first charge of $59 because her bank's three-month window for reimbursement had expired. She spent about four hours resolving these charges and waited two weeks for a replacement card. To prevent future charges, Mandava spends approximately fifteen minutes each week reviewing her credit card account. *Mem.* at 2.

ANALYSIS

To satisfy the injury-in-fact requirement for Article III standing, "the asserted injury must be 'concrete and particularized' as well as 'actual or imminent, not "conjectural" or "hypothetical."'" *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).[1] A concrete injury "must actually exist." *Spokeo, Inc. v.*

[1] Some cases mention "an invasion of a legally protected interest" as the first element of an injury in fact, *see Lujan*, 504 U.S. at 560, but this element is considered to be circular. Legal Information Institute, *Constitutional Standards: Injury in Fact, Causation, and Redressability*, https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/constitutional-standards-injury-in-fact-causation-and-redressability (last visited Feb. 18, 2020) ("[T]he 'legal right' language was 'demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected'"). The "legally protected interest" element is scarcely mentioned in cases with similar facts to the case at hand. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (omitting "invasion of a legally protected interest" from the definition and discussion of an injury in fact); *see also Whalen v. Michaels Stores, Inc.*, 689 F. App'x 89 (2d Cir. 2017*)* (summary order) (same);

Robins, 136 S. Ct. 1540, 1548 (May 16, 2016), *as revised* (May 24, 2016). Intangible injuries, like increased risk of future harm, may satisfy the concreteness requirement, but may be more difficult to recognize. *Id.* at 1549. To satisfy the particularization element, parties must be affected in "a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. The "actual or imminent" element of an injury in fact ensures that a harm "is not too speculative for Article III purposes." *See id.* at 564 n.2 ("Where there is no actual harm, however, its imminence…must be established"). *Clapper v. Amnesty International USA*, 568 U.S. 398, 410 (2013) requires an imminent injury to be "certainly impending" or to satisfy the "lesser standard" of "substantial risk of harm" for plaintiffs to satisfy the third element of an injury in fact. *See id.* at 401, 414 n.5. Harm is not imminent if it requires a "speculative chain of possibilities," or "guesswork as to how independent decisionmakers will exercise their judgment." *Id.* at 410, 413.

1. Mandava and Thomas' theories of future harm are unlikely to satisfy the injury-in-fact requirements.

Circuits split on whether increased risk of identity theft is sufficiently imminent to constitute an injury in fact; the Second Circuit has not ruled on this issue. *Steven v. Carlos Lopez & Assocs., LLC*, No. 18-CV-6500 (JMF), 2019 WL 6252347 (S.D.N.Y. Nov. 22, 2019) (denying motion to approve settlement) (collecting cases). *Steven*, suggests that threat of identity theft satisfies the injury-in-fact requirement when there is evidence that PII was actually "targeted and taken". *See also Beck v. McDonald*, 848 F.3d 262, 273-274 (4th Cir. 2017) (collecting cases). Courts that recognized an injury in fact without evidence that PII was intentionally targeted tend to apply lower standards of imminence than permitted by *Clapper*, 568 U.S. at 401, 414 n.5. *See*

Remijas v. Neiman Marcus Group, LLC, 794 F.3d 688, 691 (7th Cir. 2015) (same); *Baur*, 352 F.3d at 632 (same); *Fero v. Excellus Health Plan, Inc.*, 304 F. Supp. 3d 333, 338-339 (W.D.N.Y. 2018) (same).

Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010) (applying a standard of "credible threat of harm" to the injury-in-fact requirement); *see also Ruiz v. Gap, Inc.*, 380 F. App'x 689 (9th Cir. 2010) (unpublished decision) (same). *Compare with Hammond v. The Bank of New York Mellon Corp.*, No. 08 CIV. 6060 RMB RLE, 2010 WL 2643307, at *1, *6 (S.D.N.Y. June 25, 2010) (collecting cases). The Second Circuit also seems to consider the type of information stolen when evaluating whether the risk of identity theft is sufficiently imminent. See *Whalen v. Michaels Stores, Inc.*, 689 F. App'x 89, 90 (2d Cir. 2017) (summary order) ("[Plaintiff cannot] plausibly face a threat of future fraud, because her stolen credit card was promptly canceled after the breach and no other personally identifying information — such as her birth date or Social Security number — [was] alleged to have been stolen.").

Mandava's increased risk of fraud is unlikely to satisfy the imminence element of an injury in fact because of the limited personal information stolen during the glitch. *See id.* The facts of Mandava's case might be distinguished from *Whalen* because Mandava did not cancel her credit card for several months, and her PIN number was also exposed during the glitch, which may help a party obtain other sensitive information. Her address may have also been exposed during the glitch if her RegionEats orders were delivered to her primary address. *Id*. at 90 ("There is no evidence that other…information, such as name, address or PIN, was at risk"). These differences suggest that Mandava may face a more imminent threat of identity theft than Whalen, and the risk of future harm could be tried as a question of fact. *See Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967-968 (7th Cir 2016) (holding that the risk of identity theft from stolen credit card information is a question of fact that confers standing). However, it is unlikely the court would agree that these differences cross the threshold of

imminence based on the significant similarities to *Whalen*, 689 F. App'x 89, unless Mandava can demonstrate that this additional information generates a "substantial risk" of identity theft.

Thomas' data breach is unlikely to satisfy the elements of an injury-in-fact because the RegionEats glitch was accidental. *See Steven*, 2019 WL 6252347, at *3. Though his PII was visible to customers, it remains unclear whether his information will be fraudulently used. *See Beck*, 848 F.3d at 274. Assuming that RegionEats' investigation concluded with no evidence of malicious actors, Thomas' increased risk of future harm is too speculative because it is "contingent on a chain of attenuated hypothetical events and actions by third parties independent of the defendants". *Id*. at 268 (citing *Clapper*, 568 U.S. at 410). Six months have passed since Thomas' PII was exposed and as a breach "fade[s] further into the past… threatened injuries become more and more speculative." *Id* at 275 (internal quotation marks omitted). *Fero v. Excellus Health Plan, Inc.*, 304 F. Supp. 3d 333, 338-339 (W.D.N.Y. 2018), granted standing to plaintiffs alleging increased risk of identity theft ('non-misuse plaintiffs') because other plaintiffs suffered identity theft from the same data breach, creating a substantial risk of harm for non-misuse plaintiffs. Thomas may allege that he meets the "substantial risk" standard because Mandava's information was stolen, but his PII was likely disclosed to different users than those obtaining Mandava's information. *Id.* at 338-339. *Fero* also suggests that *Whalen*, 689 F. App'x 89 allows "theft of 'personally identifying information' alone [to] give rise to standing". *Id.* at 339. *Steven*, 2019 WL 6252347, at *3 n.4 doubts *Fero*'s interpretation because it "would expand …standing in data breach cases well beyond the law in any other Circuit.". Given the sharp circuit split, unintentional exposure of Thomas' PII is unlikely to present a "substantial risk" of harm. *Id* at 341.

2. Preventative measures against future harm may not constitute an injury in fact.

The costs associated with preventing future harm only confer standing if that harm is sufficiently imminent, so parties cannot obtain standing "by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending". *Clapper*, 568 U.S. at 402. Allegations of emotional suffering from fear of future harm were sufficient to confer standing in *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006), but later cases suggest this standard is too permissive and tend to deny emotional suffering as an injury in fact in data breach cases, particularly if the future harm is speculative. *See Hammond*, 2010 WL 2643307, at *1,*10 (collecting cases).

Mandava's efforts monitoring her account for future fraud are unlikely to confer standing because preventative measures for a non-imminent harm do not constitute an injury in fact. *See Clapper*, 568 U.S. at 402. These efforts are distinct from time spent correcting fraudulent charges because they are "not the result of any present injury, but rather the anticipation of future injury that has not materialized." *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 8 (D.D.C. 2007*)*, *aff'd,* 973 A.2d 702 (D.C. 2009); *see also infra* p. 7-8. If the court finds a "substantial risk" of harm for Mandava, *see supra* pp. 4-5, time spent monitoring her account may satisfy the injury-in-fact requirement. *See Remijas*, 794 F.3d at 694. However, it is more likely the court will conclude that Mandava's risk of fraud is too speculative, *see supra* pp. 4-5, so her precautions will not satisfy the injury-in-fact requirement.

In the unlikely case that the court finds a "substantial risk" of identity theft for Thomas, *see supra* p. 5, the cost of his $350 protection service will constitute an injury in fact. *See Clapper*, 568 U.S. at 432-38. His allegation of increased vigilance lacks specificity so he should estimate the time spent monitoring his account if he advances these claims. *See Whalen*, 689 F.

App'x at 91; *see also infra* p. 7. Nonetheless, a court is unlikely to find a "substantial risk" of identity theft for Thomas, *see supra* p. 5, so his preventative costs are unlikely to be reimbursed. *See Clapper*, 568 U.S. at 432-38.

Mandava and Thomas do not explicitly allege emotional harm, but their preventative efforts may suggest a fear of future fraud. Courts tend to reject claims of emotional harm in data breach cases, particularly if the threat of harm is non-imminent, so Mandava and Thomas are unlikely to satisfy the injury-in-fact requirement by alleging a theory of emotional harm. *See Beck*, 848 F.3d at 272-273; *see also Reilly*, 664 F.3d at 44-45; *Hammond*, 2010 WL 2643307, at *1,*10 (collecting cases).

3. Mandava's unreimbursed charge and the time spent contesting fraudulent charges satisfy the elements of an injury in fact.

Court decisions suggest that unreimbursed fraudulent charges and the time and money spent correcting charges constitute an injury in fact if allegations are sufficiently specific. *Lewert*, 819 F.3d (conferring standing based on plaintiff's time and effort resolving fraudulent charges though the charges were reimbursed); *Whalen*, 689 F. App'x at 91 (stating that plaintiff's allegations about time and effort monitoring credit were not a "particularized and concrete injury" because they lacked specificity).

Mandava's unreimbursed charge for $59 and the time spent resolving her credit card charges would likely be an injury in fact. Since these harms have already occurred, they satisfy the "actual or imminent" element; the "concrete and particular" elements warrant further discussion. In *Whalen*, 689 F. App'x at 90, the court determines that the plaintiff did not suffer a "particularized and concrete injury" because she did not incur "actual charges", implying that unreimbursed fraudulent charges, like Mandava's $59 charge, are sufficiently concrete and

particular to constitute an injury in fact. *Id.* at 90. Reimbursed charges are unlikely to satisfy the injury-in-fact requirement, *see Hammond*, 2010 WL 2643307, at *5,*8 (collecting cases). *But see Lewert*, 819 F.3d at 967. Nonetheless, the four hours Mandava spent resolving fraudulent charges and the two weeks she waited for her replacement card, are likely to satisfy the "concrete and particular" elements given the specificity required in *Whalen*, 689 F. App'x at 90-91, and constitute an injury in fact.

4. Other actual harms are unlikely to meet the requirements of an injury in fact.

In some cases, data breach plaintiffs allege "actual" injuries related to the devaluation of their PII from loss of control, but these claims are typically not recognized as an injury in fact. *See Lewert*, 819 F.3d 968 (expressing dubiousness over a property right in one's personal information, so mere theft is not an injury in fact.); *see also Remijas*, 794 F.3d at 685 (finding that loss of one's personal information does not satisfy the concreteness requirement of an injury in fact); *Sackin v. TransPerfect Glob., Inc.,* 278 F. Supp. 3d 739 (S.D.N.Y. 2017) (omitting discussion on diminished value of personal information constitutes an injury in fact); Though Mandava and Thomas suffered improper disclosure of their information, claims of devalued PII will likely lack be too "abstract". *See Spokeo*, 136 S. Ct. at 1548.

CONCLUSION

Given the facts presented, Mandava likely satisfies the injury-in-fact requirement to bring suit against RegionEats for negligent handling of her personal information because of her unreimbursed charge and the time spent contesting fraudulent charges. She is unlikely to gain standing using a theory of increased risk of identity theft, precautions against future identity

theft, emotional suffering, and devaluation of her personal information. A court is also unlikely to recognize Thomas' injuries as sufficiently imminent to confer standing on any of these grounds.

Word Count: 2,476

Applicant Details

First Name	**Liam**
Last Name	**Murphy**
Citizenship Status	**U. S. Citizen**
Email Address	**william.l.murphy@vanderbilt.edu**
Address	**Address** Street **220 25th Ave N #805** City **Nashville** State/Territory **Tennessee** Zip **37203** Country **United States**
Contact Phone Number	**914-552-7553**

Applicant Education

BA/BS From	**Johns Hopkins University**
Date of BA/BS	**May 2017**
JD/LLB From	**Vanderbilt University Law School** **http://law.vanderbilt.edu/employers-cs/judicial-clerkships/index.aspx**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Vanderbilt Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Stack, Kevin
kevin.stack@vanderbilt.edu
615-343-9220

Hans, G.S.
gautam.hans@vanderbilt.edu
615.343.2213

Kristen, Stanley
kristen.stanley@vanderbilt.edu
615-343-2217

This applicant has certified that all data entered in this profile and any application documents are true and correct.

LIAM MURPHY
729 Coleman Bridge Rd, Aiken, SC 29805
william.l.murphy@vanderbilt.edu | (914) 552-7553

The Honorable Lewis J. Liman
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, New York, NY 10007

Dear Judge Liman,

My name is Liam Murphy, and I am a third-year law student at Vanderbilt. I write to express my interest in being considered for a clerkship position in your chambers during the 2024-2025 term. Attached you will also find copies of my resume, transcripts, and writing sample. Recommendations from Professors Kevin Stack, Gautam Hans, and Kristen Stanley will also be forthcoming.

I want to clerk for you for a few reasons. Given I am primarily interested in litigation, a clerkship is the most meaningful way for me to gain hands-on pre-trial and trial experience—to research, draft, and edit, and to observe practitioners in a fast-paced setting. In addition, the Southern District would be an ideal court on which to clerk because I am from New York originally and I will be practicing in New York prior to 2024. Transitioning to a role in your chambers would thus be smoother than many other clerkship opportunities. Finally, I want to clerk after spending some time in practice because doing so will enable me to contribute more meaningfully to your work.

Because there will be a gap between the timing of this application and the term for which I am applying, I should describe my plans for the interim. In my final semester, I am taking Federal Courts, Trial Advocacy, and Appellate Practice. I am also working as a research assistant for Professor Gautam Hans and will be publishing my Law Review note. After graduation, I will take the Uniform Bar Exam and join Quinn Emanuel as an associate in New York. There I plan to gain courtroom experience from the beginning and work on matters across different practice areas, including criminal cases, investigations, IP disputes, and international arbitrations. Of course, the combination of trial-specific tasks and diverse legal subject matter is likewise the appeal of a clerkship. Through both experiences, I hope to become a more confident and versatile litigator.

Thank you for considering my application. I am available to interview at your convenience, and I sincerely look forward to the possibility of meeting you and learning more about the opportunity. Please let me know if I can provide you with any additional information along the way.

Sincerely,

Liam Murphy
J.D. Candidate, Class of 2022
Vanderbilt University Law School

LIAM MURPHY
220 25th Ave N, Nashville, TN 37203
william.l.murphy@vanderbilt.edu | (914) 552-7553

EDUCATION

VANDERBILT UNIVERSITY LAW SCHOOL, Nashville, TN
J.D. Candidate, May 2022
GPA: 3.783
Honors and Activities: VANDERBILT LAW REVIEW, Articles Editor (Note selected for publication); Scholastic Excellence Award: Legal Writing I; Lightfoot, Franklin & White Best Brief Award; Dean's List; Phi Delta Phi; Research Assistant, Professor Gautam S. Hans; Student Attorney, First Amendment Clinic; Secretary, Energy & Environmental Law Society.

JOHNS HOPKINS UNIVERSITY, Baltimore, MD
B.A., International Studies, *Honors*, May 2017
GPA: 3.710
Honors and Activities: Senior Thesis; Dean's List; Chief Copy Editor, Baltimore Zeitgeist; Undersecretary-General, JHU Model U.N. Conference; Phi Gamma Delta, Secretary.

EXPERIENCE

QUINN EMANUEL SULLIVAN & URQUHART, New York, NY
Associate: Anticipated, Fall 2022.

SCHERTLER ONORATO MEAD & SEARS, Washington, DC
Summer Associate: worked on wide variety of white-collar and other criminal matters; drafted and edited civil complaints, motions, and demand letters; assisted in client meetings and presentations to the government; observed proceedings in federal court. Summer 2021.

GLOBAL RIGHTS COMPLIANCE, The Hague, Netherlands
Legal Intern: updated Basic Investigative Standards app for accessibility and accuracy; conducted research on genocide, crimes against humanity, and war crimes. Summer 2020.

THREE GABLES FARM, Aiken, SC
Farmhand: cared for numerous livestock; landscaping and construction projects. 2018–19.

NEW VERNON CAPITAL, Jersey City, NJ
Intern: performed emerging market research; presented findings. Summer 2016.

PERSONAL

Wrote an original film script in 2017–18 about the construction of the Brooklyn Bridge; completed honors thesis on diplomacy during Spanish Civil War; workplace proficiency in German and Spanish; passions include movies, basketball, hiking, and a dog named Yogi.

UNOFFICIAL DOCUMENT ISSUED TO STUDENT – NOT OFFICIAL

Name : William Murphy
Student # : 000651204
Birth Date : 12/23

Institution Info: Vanderbilt University

Academic Program(s)

Law J.D.
Law Major

Law Academic Record (4.0 Grade System)

2019 Fall

LAW	6010	**Civil Procedure**	4.00	**A-**	14.80
Instructor:		Suzanna Sherry			
LAW	6020	**Contracts**	4.00	**B+**	13.20
Instructor:		Owen Jones			
LAW	6040	**Legal Writing I**	2.00	**A+**	8.60
Instructor:		Ann Potter Kristen Stanley			
LAW	6060	**Life of the Law**	1.00	**P**	0.00
Instructor:		Ganesh Sitaraman Timothy Meyer			
LAW	6090	**Torts**	4.00	**A**	16.00
Instructor:		Sean Seymore			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	15.00	14.00	52.60	3.757
CUMULATIVE:	15.00	14.00	52.60	3.757

2020 Spring

LAW	6030	**Criminal Law**	3.00	**P**	0.00
Instructor:		Terry Maroney			
LAW	6050	**Legal Writing II**	2.00	**P**	0.00
Instructor:		Ann Potter Kristen Stanley			
LAW	6070	**Property**	4.00	**P**	0.00
Instructor:		John Ruhl			
LAW	6080	**Regulatory State**	4.00	**P**	0.00
Instructor:		Kevin Stack			
LAW	7078	**Constitutional Law I**	3.00	**P**	0.00
Instructor:		James Blumstein			

During the Spring 2020 semester, Vanderbilt University was affected by the global COVID-19 pandemic. Instructional methods were modified and temporary changes to grading policy were implemented, including adjustments to the options for pass/fail grading. For more information, see: https://registrar.vanderbilt.edu/transcripts/transcript-key.php.

	EHRS	QHRS	QPTS	GPA
SEMESTER:	16.00	0.00	0.00	0.000
CUMULATIVE:	31.00	14.00	52.60	3.757

2020 Summer

LAW	7068	**Comp Perspec Counter Te**	2.00	**A**	8.00
Instructor:		Michael Newton			
LAW	7252	**International Arbitration**	2.00	**A**	8.00
Instructor:		Fabrizio Marrella Michael Newton			
LAW	7268	**International Energy Law**	2.00	**A-**	7.40
Instructor:		Timothy Meyer			

During the Summer 2020 term, in response to the global COVID-19 pandemic, all undergraduate instruction was moved to online and other alternative learning options. In addition, temporary changes to grading policy were implemented in various schools, including adjustments to the options for pass/fail grading. For more information, see: https://registrar.vanderbilt.edu/transcripts/transcript-key.php.

	EHRS	QHRS	QPTS	GPA
SEMESTER:	6.00	6.00	23.40	3.900
CUMULATIVE:	37.00	20.00	76.00	3.800

2020 Fall

Term Honor: Dean's List

LAW	5750	**Law Review**	0.00	**P**	0.00
Instructor:		Sean Seymore			
LAW	7000	**Administrative Law**	3.00	**A**	12.00
Instructor:		Kevin Stack			
LAW	7184	**Environmental Law I: Public**	3.00	**A-**	11.10
Instructor:		Michael Vandenbergh			
LAW	7204	**First Amend Con Law**	3.00	**A-**	11.10
Instructor:		Sara Mayeux			
LAW	7244	**Intellectual Prop Survey**	4.00	**A**	16.00
Instructor:		Joseph Fishman			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	13.00	13.00	50.20	3.861
CUMULATIVE:	50.00	33.00	126.20	3.824

Date: 01/12/2022

UNOFFICIAL DOCUMENT ISSUED TO STUDENT – NOT OFFICIAL

Name : William Murphy
Student # : 000651204
Birth Date : 12/23

2021 Spring

LAW	5750	**Law Review**	1.00	**P**	0.00
Instructor:		Sean Seymore			
LAW	7114	**Corporations**	3.00	**B**	9.00
Instructor:		Randall Thomas			
LAW	7600	**Professional Respons.**	3.00	**B+**	9.90
Instructor:		Patricia Moore Cara Suvall			
LAW	8040	**Constitutional Law II**	3.00	**A**	12.00
Instructor:		Sara Mayeux			
LAW	9154	**The Food System Seminar**	3.00	**A+**	12.90
Instructor:		John Ruhl			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	13.00	12.00	43.80	3.650
CUMULATIVE:	63.00	45.00	170.00	3.777

2021 Fall

LAW	5750	**Law Review**	1.00	**P**	0.00
Instructor:		Lisa Bressman			
LAW	6769	**First Amendment Clinic**	4.00	**A**	16.00
Instructor:		Gautam Hans			
LAW	7126	**Crim Pro: Investigation**	3.00	**B+**	9.90
Instructor:		Christopher Slobogin			
LAW	7180	**Evidence**	4.00	**A**	16.00
Instructor:		Susan Kay			
LAW	7440	**Law Review Pub Note**	1.00	**P**	0.00
Instructor:		Lisa Bressman			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	13.00	11.00	41.90	3.809
CUMULATIVE:	76.00	56.00	211.90	3.783

---------- NO ENTRIES BELOW THIS LINE ----------

Date: 01/12/2022

JOHNS HOPKINS
UNIVERSITY

ZANVYL KRIEGER SCHOOL OF ARTS & SCIENCES
Baltimore, MD 21218 www.jhu.edu/registrar

UNDERGRADUATE INTERNAL TRANSCRIPT

Student Name	Hopkins ID	Date of Birth	JHU Degree and Date Conferred	Date Printed
Murphy, William Leonard	8861E3	12/23/xxxx	Bachelor of Arts 05/24/2017	9/23/2018

Year of Study	Major	Advisor	Page
Senior	International Studies	Morgan, Sydney Van	1 of 2

Other Major(s)	Minor(s)
xxxxx	xxxxx

DIV	DEPT	CRSE #	COURSE TITLE	CRSE AREA	GRADE		CREDITS	GPA CREDITS	GPA PTS
Fall 2013				Pre-Major					
AS	ECON	180.101	Elements of Macroeconomics	S	S		3.0	0.0	0.0
AS	GRLL	210.361	Adv German I:Cult Topics Mod German	H	S	*	3.0	0.0	0.0
AS	MATH	110.106	Calculus I	Q	S		4.0	0.0	0.0
AS	POLI	190.101	Intro American Politics	S	S		3.0	0.0	0.0
AS	POLI	190.104	International Politics	S	S		3.0	0.0	0.0
			TERM GPA 0.00		TOTAL		16.0	0.0	0.0
			CUM GPA 0.00		TOTAL		16.0		
Intersession 2014				Pre-Major					
AS	EART	270.119	B'More Cleaner/Greener/Sustainable	N	S		1.0	0.0	0.0
			TERM GPA 0.00		TOTAL		1.0	0.0	0.0
			CUM GPA 0.00		TOTAL		17.0		
Spring 2014				Pre-Major					
AS	ECON	180.102	Elem of Microeconomics	S	C+		3.0	3.0	6.9
AS	ENGL	060.114	Expository Writing	H	A	*	3.0	3.0	12.0
AS	GRLL	210.362	Adv German II: Contemporary Issues	H	A	*	3.0	3.0	12.0
AS	HIST	100.104	Occ Civ: Modern Europe/Wider World	HS	B+		3.0	3.0	9.9
AS	POLI	190.102	Intro To Comp Politics	S	A-		3.0	3.0	11.1
			TERM GPA 3.46		TOTAL		15.0	15.0	51.9
			CUM GPA 3.46		TOTAL		32.0		
Fall 2014				International Studies					
AS	ENGL	060.222	American Literature, 1865 to today	H	A-		3.0	3.0	11.1
AS	ENGL	060.394	Class Fictions	H	A-	*	3.0	3.0	11.1
AS	GRLL	210.212	Intermediate Spanish II	H	A		3.0	3.0	12.0
AS	POLI	191.345	Russian Foreign Policy	S	A-		3.0	3.0	11.1
AS	PSYC	200.101	Intro to Psychology	NS	B-		3.0	3.0	8.1
			TERM GPA 3.56		TOTAL		15.0	15.0	53.4
			CUM GPA 3.51		TOTAL		47.0		
			Dean's List						
Intersession 2015				International Studies					
AS	BEHB	290.236	Ecuador: Tropical Bio & Evolution	N	A		3.0	3.0	12.0
			TERM GPA 4.00		TOTAL		3.0	3.0	12.0
			CUM GPA 3.55		TOTAL		50.0		
Spring 2015				International Studies					
AS	EASS	310.308	The Frontier in Late Imperial China	H	A	*	3.0	3.0	12.0
AS	ECON	180.266	Finan Mrkts/Institutions	S	B		3.0	3.0	9.0
AS	HIST	100.117	History of Brazil	HS	A		3.0	3.0	12.0
AS	LATS	361.130	Intro. to Latin American Studies	HS	A		3.0	3.0	12.0
AS	WRIT	220.105	Fiction Poetry Writing I	H	A	*	3.0	3.0	12.0
			TERM GPA 3.80		TOTAL		15.0	15.0	57.0
			CUM GPA 3.63		TOTAL		65.0		
			Dean's List						
Fall 2015				International Studies					
AS	AFRS	362.122	History of Africa (since 1880)	HS	A-	*	3.0	3.0	11.1
AS	ECON	180.289	Economics of Health	S	B-		3.0	3.0	8.1
AS	FILM	061.140	Introduction to Cinema, 1892-1941	H	A-		3.0	3.0	11.1
AS	HIST	100.348	20th-Century China	HS	A	*	3.0	3.0	12.0

JOHNS HOPKINS
UNIVERSITY

ZANVYL KRIEGER SCHOOL OF ARTS & SCIENCES
Baltimore, MD 21218 www.jhu.edu/registrar

UNDERGRADUATE INTERNAL TRANSCRIPT

Student Name	Hopkins ID	Date of Birth	JHU Degree and Date Conferred	Date Printed
Murphy, William Leonard	8861E3	12/23/xxxx	Bachelor of Arts 05/24/2017	9/23/2018

Year of Study	Major	Advisor	Page 2 of 2
Senior	International Studies	Morgan, Sydney Van	

Other Major(s)	Minor(s)
xxxxx	xxxxx

DIV	DEPT	CRSE #	COURSE TITLE		CRSE AREA	GRADE		CREDITS	GPA CREDITS	GPA PTS
AS	SOCI	230.213	Social Theory		S	A-	*	3.0	3.0	11.1
			TERM GPA	3.56		TOTAL		15.0	15.0	53.4
			CUM GPA	3.61		TOTAL		80.0		
			Dean's List							
Intersession 2016					International Studies					
AS	BIOL	020.170	Vaccines: Past, Present and Future		N	S		1.0	0.0	0.0
			TERM GPA	0.00		TOTAL		1.0	0.0	0.0
			CUM GPA	3.61		TOTAL		81.0		
Spring 2016					International Studies					
AS	GRLL	215.463	Borges: His Fiction/Crit Essays		H	A+	*	3.0	3.0	12.0
AS	HIST	100.306	America and the Great War		HS	A+	*	3.0	3.0	12.0
AS	HIST	100.314	The Enlightenment		HS	B+	*	3.0	3.0	9.9
AS	HIST	100.405	European Socialist Thought		HS	B+	*	3.0	3.0	9.9
			TERM GPA	3.65		TOTAL		12.0	12.0	43.8
			CUM GPA	3.62		TOTAL		93.0		
Fall 2016					International Studies					
AS	FILM	061.205	Introduction to Dramatic Writing: Film		H	A-	*	3.0	3.0	11.1
AS	HIST	100.307	Latin American Independence		HS	A	*	3.0	3.0	12.0
AS	HIST	100.360	The Modern British World		HS	A	*	3.0	3.0	12.0
AS	HIST	100.535	Independent Study			A		3.0	3.0	12.0
AS	POLI	190.443	Politics of Outer Space		S	A+	*	3.0	3.0	12.0
			TERM GPA	3.94		TOTAL		15.0	15.0	59.1
			CUM GPA	3.67		TOTAL		108.0		
			Dean's List							
Spring 2017					International Studies					
AS	HIST	100.497	Year of Revolt: 1968 in Europe		HS	A+	*	3.0	3.0	12.0
AS	HIST	100.536	Independent Study			A	*	3.0	3.0	12.0
AS	POLI	190.385	Urban Politics and Policy		S	A		3.0	3.0	12.0
AS	POLI	190.424	Policy Disasters		S	A		3.0	3.0	12.0
			TERM GPA	4.00		TOTAL		12.0	12.0	48.0
			CUM GPA	3.71		TOTAL		120.0		
			Departmental Honors, International Studies							

CUMULATIVE GPA 3.71	TOTAL	102.0
CUMULATIVE DEGREE CREDITS	TOTAL	120.0
TOTAL D/D+ CREDITS		0.0
TOTAL AP & TRANSFER CREDITS		0.0

Advisors:
Breckenridge, Adriene 09/03/2013 - 05/24/2017
Morgan, Sydney Van 05/27/2014 - 05/24/2017 - (Primary Advisor)

German language waived through the 4th semester level.
Spanish language waived through our 3rd semester level.
Graduated with General Honors

*******End Of Transcript*******

April 12, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write to provide my most enthusiastic endorsement of Liam Murphy's application to serve as one of your law clerks. I have gotten to know Liam well over the course of two classes at Vanderbilt, and I think he would be an outstanding law clerk. In my view, Liam is among the top handful of students in his very strong graduating class at Vanderbilt. I would place him much on par with my outstanding students of mine in the past 15 years of teaching who have gone on to clerkships on the U.S. Courts of Appeals (and in highly sought-after District Court clerkships).

Liam is the total package as a law clerk. He is extremely astute as a law student—he sees connections that others miss and is masterfully prepared for class. Liam also takes on board what he is learning for the long-term. On numerous occasions, I could see Liam building on what he had learned in our earlier class in the upper-level course in Administrative Law. Liam also presents himself in a concise and clear way, both in class and in writing. Liam's written assignments were among the best I have received, and I drew heavily on his exam in Administrative Law for the model answer I prepared for the class. As you will see, his writing sample shows the same polish. I believe he would produce very high quality work from his first days on the job.

In terms of intellectual interests, Liam is very broad-minded. In Administrative Law Class, I could tell he just loved the complexity of the doctrine, the difficult puzzles it presents, and the hard questions about the place of courts in relationship to agencies. In that sense, I think of Liam as a "lawyer's lawyer," the kind of person with the disposition and talent to work through the hardest problems facing the executive branch, for instance in the Office of Legal Counsel at the Department of Justice. Liam also has an interest in criminal law, and I could easily imagine him excelling as an Assistant U.S. Attorney soon after a clerkship and eventually taking on a management role in the Department of Justice or working for a D.C. firm like Williams & Connolly.

At a personal level, I think you would find Liam delightful. I enjoy talking about the law with him. We tend to do so on issues of administrative law and judicial deference—but I know his interests are much broader. He is mature and self-possessed. He spots the trade-offs of different arguments, and seems to understand that in the law the path forward is pursuing the path that is most well justified despite the tradeoffs. Liam's work is so impressive that I am hoping to have the advantage of his work for me as a research assistant when he is a third-year student. Having clerked in both a district court (SDNY) and appeals court (Ninth Circuit), I can also say that Liam would wear well in the small and often demanding environment of judicial chambers.

Liam has all the traditional markers of top law students—outstanding grades, work on the Articles Committee of the Vanderbilt Law Review, and a strong college record (at Johns Hopkins). I think his outstanding record reflects his intellectual curiosity, dedication, and talents. As to Administrative Law in particular, I believe Liam is as well prepared to clerk as any law student in the country. I know that sounds like a bold wager—take me up on it and you will see. Please do not hesitate to reach out to me if you have any questions about his candidacy.

Yours sincerely,

Kevin M. Stack
Lee S. and Charles A. Speir Professor of Law

Kevin Stack - kevin.stack@vanderbilt.edu - 615-343-9220

April 04, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am thrilled to write in support of Liam Murphy's application for a clerkship in your chambers.

Liam was a student in Vanderbilt's First Amendment Clinic, which I founded and direct, in the Fall 2021 term. From the beginning of the semester, I sensed that he would perform well in clinic. If anything, I underestimated Liam. He was one of the stars of that semester, and one of the top students I have ever taught.

Liam displayed exemplary legal skills, particularly in research and writing, on his clinic projects. He emerged as a leader in seminar and in working with his peers, and I especially appreciated his keen sense of strategy. Perhaps informed by his strong background in constitutional law, Liam's insights into the complexities of both procedure and free speech doctrine were invaluable to our docket. He demonstrated a facility with legal issues that surpassed what I expect from third-year law students. Clients raved about his work, and experienced attorneys specifically commented on his sophisticated understanding of doctrine and practice.

I was particularly impressed by his ability to comprehend doctrinal nuance in uncharted areas of law. One project involved analyzing a recently enacted Tennessee law and its First Amendment implications; Liam thoughtfully and carefully explained the potential constitutional infirmities in the law while conveying how much ambiguity existed in a context without extensive enforcement. His creativity and commitment were a major part of the clinic's success that term.

I asked Liam to work as a research assistant for me during the Spring 2022 term, as I recognized the strength of his research and writing skills. Luckily for me he accepted, and his work has exceeded my highest expectations. Liam takes on every research task with enthusiasm, provides comprehensive memoranda, and finishes projects so quickly that I am afraid I may run out of tasks to assign before the end of the term. In under two months he has already helped me frame multiple First Amendment research projects; brainstormed a new prep on Constitutional Law; and researched the dynamics of clinical supervision. Liam's efforts have accelerated my scholarship to a considerable degree, and his diligence and intelligence signal a bright future.

As in my clinic, Liam has exhibited rare talents as an RA. Discussing legal scholarship with Liam is like talking to a seasoned, thoughtful faculty colleague; it's easy to forget he is still a law student. He has a singular ability to play with ideas and discuss doctrinal nuance far beyond most junior lawyers, much less law students. His insight, zeal, and collegiality have served me so well that I fear I may never again have such a fantastic RA and interlocutor.

My experiences working with Liam are no fluke; his exceptional work as an Articles Editor on the Vanderbilt Law Review and his exemplary academic record at Vanderbilt display how strong a thinker, researcher, and writer he is. I suspect that his future colleagues at Quinn Emanuel's New York office will find his brilliant mind and indomitable work ethic invaluable, and that practice experience will no doubt make him a trusted and expert law clerk. I feel lucky to have taught and learned from a such a stellar future attorney, and I am sure I will rely upon Liam as a colleague long after he graduates. I am equally sure that you will not regret hiring him.

I cannot recommend Liam highly enough, and I hope that you will give his application a close look. I am certain that the judge he clerks for will find him as outstanding as I have. If I can provide any further information, please don't hesitate to contact me.

Warm regards,

Gautam Hans

G.S. Hans - gautam.hans@vanderbilt.edu - 615.343.2213

April 04, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

It is my honor and pleasure to offer my highest support for William Liam Murphy (Liam) as a candidate for a clerkship position in your chambers. I was Liam's legal writing instructor during his first year in law school and I believe that his sharp mind and clear writing will make him an excellent law clerk and outstanding lawyer. Moreover, his professionalism, conscientiousness, and dedication will be an asset to your chambers.

Liam is a talented legal writer, a keen thinker, and a hard worker. Liam stands out amongst his peers for his commitment to becoming a better legal thinker, writer, and person. He regularly attended my office hours to better understand, embrace, and implement the topics we discussed in class. Liam's dedication paid off: he was my top student throughout the entire year, consistently producing excellent written and oral work product. He also received the best brief award for his appellate brief.

Liam's conduct in and out of the classroom is also highly professional. Liam is very conscientious; he is always prepared; is detail oriented, and cares deeply about the quality of his work and his interactions with others. Liam's keen intellect, kind demeanor, and dedication made him a pleasure to have as a student. He is professional, personable, and communicates clearly and with conviction. He works with diligence and dedication on individual projects while also collaborating with fellow students with poise and confidence.

I cannot recommend Liam more highly. He is bright, hardworking and committed to excellence. If I can answer any questions or be of further assistance, please feel free to contact me either via telephone, 607-592-4909, or email, Kristen.Stanley@Vanderbilt.edu.

Sincerely,

Kristen M. Stanley
Instructor in Law

LIAM MURPHY

220 25th Ave North #805, Nashville, TN 37203
william.l.murphy@vanderbilt.edu | (914) 552-7553

In order to provide a legal writing sample, below I have included a copy of my appellate brief assignment, the capstone project of our first-year legal writing curriculum. It is reproduced in its entirety, only modified slightly from its originally submitted form. The relevant issues and factual context are elaborated in the brief, though I should note that the assignment consisted of a fact pattern and jurisdiction, both of which were entirely fictional. Nevertheless, the case involved a First Amendment retaliation claim brought by a public employee under 28 U.S.C. § 1983, so it attends to very real and commonly litigated questions of federal law. I wrote on behalf of defendants-appellees, City of Poetica, et al. My hope is that this brief provides insight into my ability to organize, support, and deliver a compelling legal argument on my own. For it, I received the Lightfoot, Franklin & White Best Brief Award, which means I earned the highest marks in my writing class for this work.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. Middlebury spoke as an employee when she distributed and discussed a report among superiors at work and publicly aired grievances regarding its subject matter while holding herself out in an official capacity 6

A. Middlebury spoke as an employee when she distributed and discussed the ..... report among her superiors in the course of performing her job. 7

B. Middlebury spoke as an employee when she criticized Poetica to the media and online on the subject of her work and while identified by title. 9

II. Poetica's need to govern effectively outweighs Middlebury's interest in airing criticisms because Poetica has shown multiple actual disruption in the workplace. 10

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Alves v. Bd. of Regents of the Univ. Sys. of Georgia, 804 F.3d 1149 (11th Cir. 2015) 6, 7, 9

Barone v. City of Springfield, Oregon, 902 F.3d 1091 (9th Cir. 2018) 5, 9, 10

Brandon v. Maricopa Cty., 849 F.3d 837 (9th Cir. 2017) 9, 10

Connick v. Myers, 461 U.S. 138, 140 (1983) 5, 11, 13

Foley v. Town of Randolph, 598 F.3d 1 (1st Cir. 2010) 6, 7, 9, 10

Garcetti v. Ceballos, 547 U.S. 410 (2006) ..... *passim*

Gillis v. Miller, 845 F.3d 677 (6th Cir. 2017) 6, 11, 13, 14

Graziosi v. City of Greenville Miss., 775 F.3d 731 (5th Cir. 2015) 12, 14

Grutzmacher v. Howard Cty., 851 F.3d 332 (4th Cir. 2017) 11, 12, 13

King v. Bd. of Cty. Commissioners, 916 F.3d 1339 (11th Cir. 2019) 7, 8

Lane v. Franks, 573 U.S. 228 (2014) 7, 8

McArdle v. Peoria Sch. Dist. No. 150, 705 F.3d 751 (7th Cir. 2013) 8, 9

Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015) 12, 14

O'Connell v. Marrero-Recio, 724 F.3d 117 (1st Cir. 2013) 8, 9

Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois, 391 U.S. 563 (1968) 6, 10, 12, 13

Rankin v. McPherson, 483 U.S. 378 (1987) 11

Rohrbough v. Univ. of Colorado Hosp. Auth., 596 F.3d 741 (10th Cir. 2010) 8, 9

Waters v. Churchill, 511 U.S. 661 (1994) 11, 13

STATUTES

28 U.S.C. § 1291 (2020) 1

28 U.S.C. § 1331 (2020) 1

42 U.S.C. § 1983 (2020) 1

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 1, 5

STATEMENT OF JURISDICTION

The United States District Court for the District of Cinquanto granted summary judgment in favor of Defendants on February 3, 2020. (R. at 53-54.) The district court had federal question subject-matter jurisdiction because Plaintiff-Appellant raised a First Amendment retaliation claim under federal law. U.S. Const. amend. I; 28 U.S.C. § 1331 (2020); 42 U.S.C. § 1983 (2020). Plaintiff filed a timely appeal on February 5, 2020, which this Court granted on February 21, 2020. (R. at 55, 57.) Because the district court rendered a final decision that dispensed with all claims, this Court has jurisdiction over the appeal. 28 U.S.C. § 1291 (2020).

STATEMENT OF THE ISSUES

I. Did Plaintiff Middlebury speak as a public employee, and thereby forfeit protection under the First Amendment, when she distributed and discussed a report among her superiors and then publicly criticized her employer, Defendant Poetica, in the media and online, identified herself as a Poetica employee, and discussed information gathered at work?

II. Assuming arguendo Middlebury spoke as a citizen, does Poetica's need to efficiently provide public services outweigh her interest in airing grievances when Middlebury disrupted workplace harmony and relationships, impaired the performance of her own duties, and threatened ongoing efforts to address the matter of public concern?

STATEMENT OF THE CASE

Procedural History

Plaintiff Charlotte Middlebury filed a complaint pursuant to 42 U.S.C. § 1983 against her former employers, Defendants City of Poetica, et al., alleging freedom of speech retaliation and seeking declaratory and injunctive relief in the form of reinstatement to her former position of Assistant Director of Human Resources. (R. at 1-2.) Defendants timely answered, denying any

entitlement to relief and moved for summary judgment, contending Plaintiff failed to prove a *prima facie* retaliation claim, which entitled them to judgment as a matter of law. (R. at 11, 13.) The district court agreed and granted the motion in favor of Defendants, finding that although some of Plaintiff's actions constituted protected citizen speech, her interest in such expression failed to outweigh Defendants' need to promote efficiency and avoid disruption in the workplace. (R. at 54.) Plaintiff timely filed an appeal, which this Court granted. (R. at 55-57.)

Statement of Facts

In July 2018, Charlotte Middlebury became Assistant Director of Human Resources for the City of Poetica. (R. at 3, 8.) Her new supervisor, Director Charles Ruffles, promoted Middlebury because she had done a great job previously and noted that the new role informally involved "pretty much everything," and formally involved overseeing human resources—broad and demanding characterizations confirmed by Middlebury herself. (R. at 15, 27.)

On August 27, 2018, Middlebury and Ruffles met with Deputy Mayors Grace Moderno and Marvin Gregory, during which Middlebury expressed gender equity concerns about the city's hiring and compensation practices, particularly with respect to director-level positions like her own, and offered a recommendation on the matter. (R. at 3, 8.) Soon thereafter, Middlebury requested to meet with Moderno, "woman to woman," and Moderno instructed Middlebury to conduct a formal report on the gender equity issue and share it with her and Ruffles. (R. at 17, 39.) Middlebury did so on September 7, 2018, as requested. (R. at 17, 39.) They met again that October, when Moderno informed Middlebury she had passed along the report to the Mayor's office and emphasized the importance of confidentiality in their work, to which Middlebury insisted she would use her "utmost discretion in handling sensitive issues." (R. at 17.)

In November 2018, Middlebury participated in a march outside Poetica city hall organized by Break the Glass, a nonprofit seeking to promote gender equity in government. (R. at 18.) During the event, she had her picture taken and spoke with a reporter from the *Poetica Chronicle* newspaper, introducing herself and agreeing to be identified as the city's Assistant Director of Human Resources. (R. at 18-19, 23.) Middlebury's comments to the reporter, as quoted in the paper and confirmed by her, included criticism of the City's gender equity efforts directed explicitly at Moderno and Gregory, as well as a public call to action. (R. at 19, 23.) Middlebury explained that the impetus for attending the march and criticizing the City to the reporter was her "first-hand" knowledge of Poetica's issues with gender equity based on her past work as well as the report she had conducted for Moderno. (R. at 18-19.) Her interactions with the reporter prompted a Poetica city council member to email Ruffles to express his concern about its potentially negative impact on the Poetica government and ask that Ruffles look into the matter and find a way to avoid formally disciplining Middlebury. (R. at 35.)

In February 2019, Middlebury sent her September report directly to the Mayor and discussed it with colleagues in other departments, which prompted Moderno to reiterate the confidentiality considerations the two had discussed months prior. (R. at 20, 43.) Middlebury reacted to this by posting on a Break the Glass online forum, where she had previously posted in August 2018 to share the news of her promotion and her desire to make gender equity inroads in that capacity. (R. at 26.) The February post, made shortly after Moderno sent Middlebury the email, received 40,000 "likes" and included the following: "I'm so frustrated by Poetica. I told them informally, I told them formally … but it doesn't seem to matter. What does that say about the City? Until this is addressed…." (R. at 26.) Middlebury then met with Ruffles and the Deputy Mayors, and they explained that her disregard for confidentiality had negatively

impacted relationships between departments and employees, particularly concerning their respective compensation, impaired Middlebury's job performance, and undermined Poetica's existing efforts on gender issues. (R. at 20, 30, 41.) After this meeting, Ruffles and Moderno concluded it was necessary to terminate Middlebury to prevent further disturbance to the workplace; Moderno told Ruffles to take care of it and he did so in March 2019. (R. at 30, 41.)

SUMMARY OF THE ARGUMENT

This Court should affirm summary judgment in favor of Poetica because no reasonable jury could find that Middlebury spoke as a private citizen nor that her interest in publicizing work-related grievances outweighs Poetica's interest in the efficient operation of its government.

Speech is unprotected, and therefore amenable to disciplinary action, when a government worker makes it as an employee rather than as a citizen. The Supreme Court holds unprotectable all speech made "pursuant to … official duties." Garcetti v. Ceballos, 547 U.S. 410, 421, 424 (2006). The key determination is whether the speech owed its existence to the employee's job, which can be indicated by its occurrence in the course of performing work, by the apparently official capacity in which it is spoken, or by its containing work-specific information. This guidance necessarily leads to the conclusion that Middlebury uniformly spoke as a public employee and should therefore not receive First Amendment protection. Middlebury spoke as such when she disseminated and discussed the report at work because she did so pursuant to her duties. The comments to the media and online were also unprotected because Middlebury identified herself by job title, intended to advance work-specific concerns, and discussed information only available to her due to that role. She therefore spoke as a public employee.

Even if this Court finds Middlebury spoke as a private citizen, Poetica's interest in promoting efficiency outweighs her right to publicize work-related concerns. The Supreme Court

has stated this balancing test requires "full consideration" of the government employer's interest in maintaining discipline, harmony, and confidence in furtherance of providing necessary public services. See Connick v. Myers, 461 U.S. 138, 140, 150-151 (1983). If a government employer shows a reasonable expectation of disruption due to an employee's speech, this Court should rule in its favor and preserve the government's capacity to serve the public effectively. Such is the case here. Middlebury's conduct contravened the instructions of her superiors, jeopardized professional relationships necessary to the proper functioning of government, and undermined the confidence of her colleagues and the public that the department would be run effectively. Middlebury's speech was persistently insubordinate and impaired the efficient operation of the government, including not only the tasks for which she had been responsible, but also the gender equity efforts motivating the speech itself. Thus, the balance of interest strongly favors Poetica.

ARGUMENT

This Court should affirm summary judgment because no reasonable jury could find that Middlebury spoke as a citizen and that her interest in receiving First Amendment protection outweighs Poetica's interest in providing public services efficiently. See U.S. Const. amend. I. On appeal, this Court reviews a grant of summary judgment *de novo*. Poetica remains entitled to judgment as a matter of law based on multiple grounds supported by the record. See, e.g., Barone v. City of Springfield, 902 F.3d 1091, 1097 (9th Cir. 2018).

The First Amendment affords ample protection for public employees seeking to express their concerns as citizens, but by entering government service these employees necessarily accept certain limitations on their speech, for the interests at stake "extend beyond the speaker." Garcetti v. Ceballos, 547 U.S. 410, 418-19 (2006). Thus, in order to succeed on a First Amendment retaliation claim, a public employee must demonstrate both that she: (1) spoke as a

citizen on a matter of public concern; and that (2) her interest in commenting on such matters outweighs the government's interest in performing efficient public services. See id. at 418; Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., 391 U.S. 563, 568 (1968). In this case, the parties do not dispute that Plaintiff Middlebury's speech touched on a matter of public concern, nor that it was a substantial factor in the decision to let her go. (R. at 5-6, 10-11.) Yet despite the district court finding some citizen speech, Middlebury spoke as a public employee when she: (1) distributed and discussed an internal memo to superiors in her capacity as Assistant Director of Human Resources; and (2) publicly criticized Defendants about the subject matter of that report while identifying herself by that title. See Garcetti, 547 U.S. at 421; see, e.g., Alves v. Bd. of Regents of the Univ. Sys. of Ga., 804 F.3d 1149, 1164 (11th Cir. 2015); see, e.g., Foley v. Town of Randolph, 598 F.3d 1, 6 (1st Cir. 2010); (R. at 23-26.) The inquiry should end there, but even assuming citizen speech is found, Poetica still prevails because its interest in efficient governance outweighs Middlebury's interest in airing her grievances. See Pickering, 391 U.S. at 568; see, e.g., Gillis v. Miller, 845 F.3d 677, 687 (6th Cir. 2017). For these reasons, affirming summary judgment is sound on both fronts.

I. Middlebury spoke as an employee when she distributed and discussed a report among superiors at work and publicly aired grievances regarding its subject matter while holding herself out in an official capacity.

The district court correctly concluded that Middlebury's distribution and discussion of the report constituted employee speech, but this Court should also find her subsequent public criticisms were unprotected by the First Amendment. "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Garcetti, 547 U.S. at 421. The Supreme Court defined such employee speech as that

which "owes its existence to a public employee's professional responsibilities," id. at 421-22, and more recently as speech "ordinarily within the scope of an employee's duties." Lane v. Franks, 573 U.S. 228, 240 (2014). The undisputed facts show Middlebury distributed and discussed her memorandum at work "pursuant to" her duties as Assistant Direct of Human Resources. See Garcetti, 547 U.S. at 421; see, e.g., Alves, 804 F.3d at 1164 (classifying employee speech as "activities undertaken in the course of performing one's job"); (R. at 17, 39.) Middlebury also spoke as an employee when she criticized Defendants publicly to the media and online while identified as the Assistant Director of Human Resources and based on information that owed its existence to her job. See Lane, 573 U.S. at 240; see, e.g., Foley, 598 F.3d at 6 (finding employee speech where speaker "would naturally be regarded as the face of the Department"); (R. at 23-26.) Because Middlebury spoke as an employee, Poetica is entitled to judgment as a matter of law. See Garcetti, 547 U.S. at 421.

A. Middlebury spoke as an employee when she distributed and discussed the report among her superiors in the course of performing her job.

Speech is made pursuant to official duties, and therefore unprotected by the First Amendment, where the impetus for it was job-related responsibilities. See Lane, 573 U.S. at 240; Garcetti, 547 U.S. at 421; see, e.g., King v. Bd. of Cty. Comm., 916 F.3d 1339, 1346 (11th Cir. 2019). In King, a doctor responsible for medically clearing firefighters was not rehired after she filed a routine report and complained to colleagues about the treatment of a candidate. 916 F.3d at 1341. The court held both King's filing of the report and discussing the matter further with colleagues was typical of, and arose from, her job and thus constituted employee speech barred from protection. King, 916 F.3d at 1349. Indeed, courts widely find reporting to colleagues while at work pursuant to official duties, regardless of whether it is actually required or part of a daily routine. See Alves, 804 F.3d at 1164 (finding employee speech where reporting a colleague's

misconduct was not ordinary daily activity); McArdle v. Peoria Sch. Dist. No. 150, 705 F.3d 751, 754 (7th Cir. 2013) (filing complaint of a superior's misuse of funds not required legally nor by job description); O'Connell v. Marrero-Recio, 724 F.3d 117, 123 (1st Cir. 2013) (Director of Human Resources expressing reluctance voluntarily to superiors about carrying out unethical instructions nevertheless unprotected); Rohrbough v. Univ. of Colorado Hosp. Auth., 596 F.3d 741, 747 (10th Cir. 2010) (dispersing reports and conversing among colleagues outside chain of command still employee speech because it "stemmed from and was of the type the employee was paid to do"). The weight of authority thus demonstrates that an employee who reports to superiors and discusses those reports while at work speaks without First Amendment protection. See Garcetti, 547 U.S. at 421; see, e.g., King, 916 F.3d at 1346.

Middlebury spoke as an employee in distributing and discussing her report at work and among her superiors. See Lane, 573 U.S. at 240; Garcetti, 547 U.S. at 421; King, 916 F.3d at 1346; (R. at 17, 39.) As in King, Middlebury prepared a report for her superiors upon request and during work. See King, 916 F.3d at 1341; (R. at 17, 39.) Preparing the report fell within Middlebury's job responsibilities, which by her own admission consisted of "anything to do with HR," including specifically the updating of policies, maintaining of employment records, and providing organizational advice, all at the request of management. See id. at 1346; (R. at 15, 33.) Moderno requested Middlebury conduct a "formal" report on precisely the aforementioned matters, clearly suggesting she acted "pursuant to official duties" in drafting and distributing it, and that her additional discussion of the report was "ordinarily within the scope" of her duties. See Lane, 573 U.S. at 240; Garcetti, 547 U.S. at 421; id.; (R. at 17, 39.) And although it is reasonable to conclude Middlebury's report and discourse with superiors were required and routine parts of her job, neither is necessary to demonstrating she spoke as an employee. See

Alves, 804 F.3d at 1164 (reporting misconduct need not be routine activity); McArdle, 705 F.3d at 754 (filing complaint need not be required by employer); O'Connell, 724 F.3d at 123 (Director of Human Resources expressing reluctance voluntarily to superiors about carrying out unethical instructions nevertheless unprotected); Rohrbough, 596 F.3d at 747 (dispersing and discussing a report need not be within the chain of command); (R. at 15, 17, 33, 39.) Thus, when Middlebury produced a report at the request of a superior and subsequently discussed it at work as part of her Human Resources function, she spoke as an employee. See Lane, 573 U.S. at 240; Garcetti, 547 U.S. at 421; King, 916 F.3d at 1346; (R. at 17, 39.)

B. Middlebury spoke as an employee when she criticized Poetica to the media and online on the subject of her work and while identified by title.

Courts find speech unprotected where an employee directly and publicly criticizes her employer while holding herself out in an official capacity and discussing information stemming from her work. See Garcetti, 547 U.S. at 422; Barone, 902 F.3d at 1100; Brandon v. Maricopa Cty., 849 F.3d 837, 845-46 (9th Cir. 2017); Foley, 598 F.3d at 7-8. In Barone, an official responsible for fielding complaints from the community publicly criticized her police department's efforts involving racial issues, which the court was found employee speech in part because she was clearly identified in her official capacity and describing the complaints she "regularly received" in the course of her work. 902 F.3d at 1100-01. Similarly, Foley saw a fire chief's speech to news cameras that blasted his department's funding found to be employee speech, largely because he held himself out to be an official source of department information, or to ostensibly "bear [its] imprimatur." 598 F.3d at 7-8. Finally, in Brandon a lawyer expressed to the media her disagreement with a settlement decision, which the court found to be employee speech partly because it "touched on the very matter" the lawyer had worked on. 849 F.3d at 845-46. Thus, where an official holds herself out as a department authority and criticizes a policy

regarding matters within her purview, the employee speaks as a public employee. See Garcetti, 547 U.S. at 422; Barone, 902 F.3d at 1100; Brandon, 849 F.3d at 845-46; Foley, 598 F.3d at 7-8.

Middlebury's public comments constituted citizen speech because she directly criticized her employer while holding herself out as a public official and relying upon information to which she only had access because of her job. See Garcetti, 547 U.S. at 422; Barone, 902 F.3d at 1100; Brandon, 849 F.3d at 845-46; Foley, 598 F.3d at 7-8. As in Barone, Middlebury's comments to the reporter and online posts dealt directly with the subject matter of her work. See 902 F.3d at 1100; (R. at 18-19, 23-26.) As in Foley, she spoke with an apparent or ostensible purpose of identification by her job title and carrying the imprimatur of her department; at minimum she sought to use her title to incite change at work. See 598 F.3d at 7-8; (R. at 18-19, 23, 26.) And as in Brandon, Middlebury's public speech stemmed directly from her "first-hand" work product. See 849 F.3d at 845-46; (R. at 19.) In sum, Middlebury's public criticism of Poetica owed its existence to her job in that it appeared to carry official weight, concerned her work concerns, and depended on information gleaned therefrom. See Garcetti, 547 U.S. at 422; Barone, 902 F.3d at 1100; Brandon, 849 F.3d at 845-46; Foley, 598 F.3d at 7-8; (R. at 18-19, 23-26.)

II. Poetica's need to govern effectively outweighs Middlebury's interest in airing criticisms because Poetica has shown actual disruption in the workplace.

Poetica's need to effectively provide public services prevails over Middlebury's desire to publicize her job-related complaints. Resolving First Amendment claims involving speech by citizens on matters of public concern has long required courts "to arrive at a balance between the interests" of aggrieved public employees and government employers seeking to operate efficiently. Pickering, 391 U.S. at 568. In Pickering, the Supreme Court found this balance favored a teacher who criticized the school administration because there was "no question of maintaining either discipline by immediate superiors or harmony among coworkers," harming

"close working relationships," or impeding "proper performance" of the employee's duties and the "regular operation" of the workplace. Id. at 570, 572. The Court later reiterated these "pertinent considerations," emphasizing that "interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function," and thus represent a "strong state interest." Rankin v. McPherson, 483 U.S. 378, 388 (1987). There the Court also found public employees bear a "burden of caution" commensurate to the "extent of authority" their role entails. Id. at 390. Poetica's interest clearly outweighs that of Middlebury: Poetica decided to terminate a once-trusted senior official in the face of disruption to workplace discipline, harmony, and relationships, as well as to the performance of Middlebury's own role and to efforts already being made to address the matter of public concern. See Gillis, 845 F.3d at 687; Grutzmacher v. Howard Cty., 851 F.3d 332, 345-48 (4th Cir. 2017). Thus, regardless of whether Middlebury spoke as a citizen, Poetica is entitled to judgment as a matter of law.

Government employers need only show they reasonably expected the employee's speech to disrupt their effective administration of services to show a substantial interest in efficiency. See Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion) (suggesting courts give "substantial weight to government employers' reasonable predictions of disruption"); Connick, 461 U.S. at 152 (concluding disruption of the workplace need not be "manifest" for discipline to be justified); e.g., Gillis, 845 F.3d at 687 (joining the vast majority of circuits in finding proof of actual disruption unnecessary). In Gillis, a correctional officer disseminated a memorandum to colleagues seeking to inform them of their union rights during an investigation by superiors into department misconduct. 845 F.3d at 681-82. Despite the seriousness of the interests at hand, and absent a showing of actual disruption, the court found management's concerns of harm to workplace cohesion, as well as to the integrity of its investigation, "sufficient to outweigh any

freedom of speech interests" present in the case. Id. at 688. Thus, as Gillis and the weight of authority demonstrate, it is unnecessary to show actual disruption, and reasonable anticipation of workplace trouble stemming from an employee's speech suffices in tipping the balance in favor of the employer. See Waters, 511 U.S. at 673; Connick, 461 U.S. at 151; id. at 687-88.

Disruption to workplace harmony and relationships, employee performance, or to efforts regarding the underlying matter of public concern, supports finding a government employer's interest in efficient operation outweighs an employee's right to unfettered speech. See Pickering, 391 U.S. at 568; Grutzmacher, 851 F.3d at 345-48. In Grutzmacher, the court concluded that an employee's critical Facebook posts: (1) "interfered with and impaired Department operations and discipline as well as working relationships;" (2) "conflicted with [his] responsibilities," which carries more weight due to his supervisory role; (3) "frustrated the Department's public safety mission;" and (4) expressly disrespected his superiors, which the employer was not required to tolerate. Grutzmacher, 851 F.3d at 345-47. Grutzmacher demonstrates that a limited set of public comments by an employee can substantially and variously disrupt a government employer's provision of public services. Yet case law across circuits also indicates that showing even one enumerated form of disruption can defeat an employee's interest in espousing work-related concerns. See Graziosi v. City of Greenville, 775 F.3d 731, 741 (5th Cir. 2015) (police offer's comments were sufficiently disruptive in creating "buzz around the department" that impaired close working relationships); Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 476 (3d Cir. 2015) (teacher's online comments criticizing her students and colleagues sufficed in disrupting performance of her job duties). Thus, an employer who shows actual disruption to several enumerated interests far exceeds not only the reasonable prediction standard, but also the

substantial authority suggesting one such interest can pass muster. See Pickering, 391 U.S. at 568; Grutzmacher, 851 F.3d at 345-48 (applying same standard).

Because Poetica demonstrates Middlebury actually disrupted its effective governance, it not only meets but in fact surpasses the reasonable prediction standard. See Waters, 511 U.S. at 673; Connick, 461 U.S. at 151; see, e.g., Gillis, 845 F.3d at 687; (R. at 30, 41.) As in Gillis, Middlebury distributed a memo and engaged in other forms of speech to advance her work-related concerns; yet here Poetica also shows several forms of actual (or "manifest") disruption to the cohesion and effectiveness of its workplace, thereby exceeding the standard applied in that case and elsewhere. Connick, 461 U.S. at 151; see, e.g., Gillis, 845 F.3d at 681-82, 687; (R. at 30, 41.) It follows that if the lesser showing of reasonably predicted disruption was "sufficient to outweigh any freedom of speech interests" present there, this Court should give Poetica's interests even more than the "substantial weight" counseled by the Supreme Court. See Waters, 511 U.S. at 673; Gillis, 845 F.3d at 688. As further explication of Poetica's numerous efficiency interests will show, it more than sufficiently demonstrates disruption, actual and anticipatory. See Waters, 511 U.S. at 673; Connick, 461 U.S. at 151; Gillis, 845 F.3d at 687-88; (R. at 30, 41.)

Poetica demonstrates actual disruption to its workplace harmony and relationships, to the performance of its Human Resources function, and reasonable predictions of further disruption not only to those interests, but also to its efforts in promoting gender equity. See Pickering, 391 U.S. at 568; Grutzmacher, 851 F.3d at 345-48; (R. at 20, 30, 35, 43.) Middlebury's public criticisms track the showing in Grutzmacher because Middlebury: (1) interfered with and impaired operations and relationships within the Poetica government; (2) conflicted with and undermined Middlebury's responsibilities as a supervisory official; (3) frustrated the existing gender equity mission; and (4) expressly disrespected superiors. See Grutzmacher, 851 F.3d at

345-47; (R. at 20, 30, 35, 43.) Middlebury thus substantially disrupted the effective functioning of the Poetica government, which Grutzmacher indicates is enough to support judgment in favor of an employer. See id. at 348; (R. at 20, 30, 35, 43.) Furthermore, although Poetica acknowledges that its claims of disruption with respect to its gender equity mission and the performance of Human Resources functions rests partly on a reasonable prediction theory, even just one enumerated efficiency interest suffices. See Graziosi, 775 F.3d at 741; Munroe, 805 F.3d at 476; (R. at 30, 43.) It is clear that Poetica's disruption showing here is ample, in light of both the lenient standard this Court should apply and the substantive impact of Middlebury's criticisms. See Pickering, 391 U.S. at 568; Gillis, 845 F.3d at 687; Grutzmacher, 851 F.3d at 345-48; (R. at 30, 35, 43.) Poetica is therefore entitled to judgment as a matter of law.

CONCLUSION

This Court should affirm the district court's grant of summary judgment in favor of Poetica because Middlebury spoke as a public employee and the city's need to govern effectively outweighs her interest in criticizing and undermining her superiors. Plaintiff-Appellant failed to prove she spoke as a citizen and that her interest in unencumbered work-related speech outweighs Poetica's disruption concerns, both of which are necessary in order for this Court to grant First Amendment protection. Poetica thus remains entitled to judgment as a matter of law.

Applicant Details

First Name	**Scott**
Last Name	**Nielson**
Citizenship Status	**U. S. Citizen**
Email Address	**scn15@georgetown.edu**
Address	**Address** Street **207 F Street NE** City **Washington** State/Territory **District of Columbia** Zip **20002**
Contact Phone Number	**8017120360**

Applicant Education

BA/BS From	**Brigham Young University**
Date of BA/BS	**June 2012**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2017**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia, New York**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Rosenkranz, Nicholas
nqr@law.georgetown.edu
Newton, Brent
ben5@georgetown.edu
Barnett, Randy
rb325@law.georgetown.edu
202-662-9936

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SCOTT NIELSON
Rua Leopoldo Couto de Magalhães 610, São Paulo, Brazil, 04542-902
+55 (11) 94575-5357 | scn15@georgetown.edu

March 6, 2022

The Honorable Lewis Liman
500 Pearl St., Courtroom 15C
New York, NY 10007-1312

Dear Judge Liman:

I am an associate attorney at Kobre & Kim, and I am interested in clerking for you beginning in the summer or fall of 2024. I taught social studies in the Bronx for two years before law school, and I would like to return to New York as a judicial clerk. Additionally, my post law school litigation experience makes me a qualified candidate for the job.

Since graduating, I have worked on several cross-border litigation and government investigations matters. At Dentons Muñoz in Costa Rica I worked on an extradition case and helped prepare for an extradition hearing. After taking the February 2018 bar exam, I joined Skadden in São Paulo, where I worked on an internal investigation for one of Brazil's largest companies. On this case, I reviewed and commented on interview questions prepared by a local law firm and drafted memoranda to assist the company with its investigation. Since joining Kobre & Kim in March 2020, I have worked on several 28 USC § 1782 discovery applications (both as applicant and respondent), two political asylum cases, and an investigation in which we are soliciting the assistance of the DOJ as a victim.

As a law student, I did well in relevant courses. I achieved the highest grade in my Criminal Procedure, Criminal Law, and Statutory Interpretation courses, and I also did well in Constitutional Law I, Constitutional Law II, and Federal Courts.

I would welcome the opportunity to interview in the coming weeks. I have enclosed my resume, transcript, and writing sample for your review. Letters of recommendation from Professors Newton, Rosenkranz, and Barnett will follow. Thank you for your time and consideration.

Respectfully,

Scott Nielson

SCOTT NIELSON
Rua Leopoldo Couto de Magalhães 610, São Paulo, Brazil, 04542-902
+55 (11) 94575-5357 | scn15@georgetown.edu

EDUCATION

Georgetown University Law Center, Washington, DC
Juris Doctor, May 2017
GPA 3.5/4.0
Activities: Guantanamo Observers Program; Global Teaching Fellow; Prosecution Externship Seminar

Fordham University, New York, NY
Master of Science in Teaching, June 2014
GPA 4.0/4.0
Activities: Teach for America Corps Member

Brigham Young University, Provo, UT
Bachelor of Arts in History, Minor in Spanish, June 2012
GPA 3.72/4.0
Activities: Mexico Study Abroad; World History Teaching Assistant; Washington Seminar

EXPERIENCE

Kobre & Kim LLP, São Paulo, Brazil — March 2020 – Present
Associate Attorney
Draft memoranda of law, declarations, subpoenas, responses and objections, and meet and confer letters for several 28 USC § 1782 applications, both as applicant and respondent. Draft motions in support of judgment enforcement and civil contempt proceedings for one of the largest Ponzi schemes in U.S. history. Conduct interviews, draft an affidavit, and write a brief in a political asylum case. Research legal precedents for meet and confer letters, legal briefing, and oral argument in a cross-border asset forfeiture case.

Skadden, Arps, Slate, Meagher & Flom LLP, São Paulo, Brazil — April 2018 – March 2020
Staff Attorney
Drafted narrative responses to government questions, provided quality control feedback to first-level document reviewers, and updated case chronology for a joint SEC/DOJ cross-border FCPA investigation of a fortune 500 company with a Brazilian subsidiary. Prepared witness interview questions, compiled a comprehensive chronology, created search terms for document review, and trained and supervised a team of 50 Brazilian document reviewers for an internal investigation for one of Brazil's largest companies. Reviewed Portuguese documents and reported findings to attorneys in a white-collar investigation spanning Brazil, Portugal, and lusophone Africa. Drafted affidavits, conducted interviews, and prepared briefs in a political asylum case for a Venezuelan couple.

Dentons Muñoz, San José, Costa Rica — September – November 2017
Foreign Associate
Compiled volumes of binders for the U.S. Department of Justice, organizing evidence for an extradition hearing in a financial fraud case. Reviewed and made corrections to an indictment in Spanish. Edited a legal opinion on Costa Rican finance and accounting law. Translated a demand letter from Spanish to English. Assisted a senior partner in a business development initiative.

Pinheiro Neto Advogados, São Paulo, Brazil — July – August 2017
Legal Intern
Advised a multinational bank on its termination with a payment service provider, commenting on Central Bank regulations and contractual provisions. Compiled a database categorizing anti-corruption and compliance provisions of U.S. and Brazilian companies.

Citibank, São Paulo, Brazil — June – July 2017
Legal Intern, Legal Department
Edited contracts for offshore loans under New York law. Drafted anti-corruption and sanctions compliance clauses for cross-border transactions. Proofread correspondence between São Paulo and New York offices. Revised contracts for private banking clients.

Arias & Muñoz (combined with Dentons LLP), San José, Costa Rica — June – August 2016
Summer Associate
Edited and translated several documents advising multinational companies on anti-corruption, anti-money laundering, and corporate compliance issues. Drafted an audit report for a multinational shipping company and its Latin America subsidiary summarizing the procedural history of a Costa Rican litigation matter. Designed and taught English Writing for Lawyers course to Costa Rican lawyers.

U.S. Department of Justice, Washington, DC — January – April 2016
Legal Intern, Criminal Division Fraud Section
Evaluated whether to bring charges in a foreign corruption case and drafted witness questions. Drafted a mutual legal assistance treaty (MLAT) request for a criminal securities fraud case. Summarized depositions for U.S. Attorney meetings in a Latin America corruption case. Reviewed and translated Spanish documents to find evidence of bribery of state-owned enterprises.

Securities and Exchange Commission, Washington, DC August – November 2015
Honors Legal Intern, Division of Enforcement
Researched and wrote memorandum related to international service of process. Reviewed Spanish documents, analyzed financial statements to find evidence of fraud, and planned questions for depositions. Drafted border watches and subpoenas for investigations.

U.S. District Court for the District of Utah, Salt Lake City, UT May – July 2015
Judicial Intern for The Honorable Ted Stewart
Drafted bench memoranda and judicial orders for motions in various procedural postures, on issues related to commercial litigation, evidence, constitutional law, and personal jurisdiction. Proofread orders for judicial clerks. Attended 25 civil and criminal hearings.

Teach For America, Bronx, NY June 2012 – June 2014
High School Teacher
Taught economics, government, world history, and special education to recent immigrant students primarily from Latin America. Taught approximately one third of my courses in Spanish. Implemented a project-based learning curriculum. Visited the Dominican Republic with a group of NYC teachers to study their history, culture, and language. Selected as top 10% of 48,000 applicants.

Office of Senator Mike Lee, Washington, DC August – December 2011
U.S. Senate Intern
Prepared briefs for legislative staff. Reported on committee hearings and informational luncheons. Managed an intern project to create a comprehensive database of local elected officials. Communicated the Senator's positions to the public by phone and email.

The Church of Jesus Christ of Latter-day Saints, Houston, TX October 2006 – October 2008
Spanish-speaking Missionary
Trained and supervised 10 missionaries responsible for religious outreach in the Houston area. Following Hurricane Ike, oversaw volunteer efforts in Galveston, helping salvage over 100 homes. Became fluent in Spanish through one-hour daily personal study, extensive reading of high-level texts, mastery of advanced grammar principles, and speaking and listening for several hours each day.

ADMISSIONS

New York
Washington, D.C.
Foreign Legal Consultant, São Paulo, Brazil
U.S. District Court for the Southern District of New York
U.S. District Court for the Eastern District of New York
U.S. Court of Appeals for the Second Circuit
Executive Office for Immigration Review

PUBLICATIONS

- Co-author, "O Escopo da Jurisdição dos EUA em Casos de Corrupção Estrangeira" [*The Scope of U.S. Jurisdiction in Foreign Corruption Cases*] (Quartier Latin, Forthcoming)
- Co-author, "Engel List Foreshadows U.S. Enforcement in Central America" (Anti-Corruption Report, December 1, 2021)
- Co-author, "Enforcement of Foreign Judgments in Brazil" (Lexology, June 2020 issue)
- Co-author, "U.S. Courts Address Recognition of Venezuelan Government in Arbitration Enforcement Proceedings" (Corporate Disputes Magazine, January - March 2020 issue)

ADDITIONAL

Languages: English (native); Portuguese (fluent); Spanish (fluent)
Hobbies: enjoy Latin America travel, cinema, reading, piano, and skiing

Scott Nielson
Georgetown University Law Center
Cumulative GPA: 3.50

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure	Newton	A	2	
Externship Seminar	Caesar	P	3	
Constitutional Law I	Rosenkranz	A	3	
Corporations	Diamond	B	4	
International Law I	Byron	B+	3	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Professional Responsibility	Carlson & Duval	B+	2	
Evidence	Rothstein	B	4	
Global Teaching Fellow	Koplow	P	1	
Prosecution Externship Seminar	Parker	P	4	
Separation of Powers Seminar	Clement & Dinh	A-	3	

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Cross-Border Transactions in Latin America Seminar	Noyola	A	2	
Recent Books on the Constitution Seminar	Barnett	A-	3	
Constitutional Law II	Barnett	A-	4	
Federal Courts	Rosenkranz	A-	3	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Federal White Collar Crime	Cary & Latcovich	B+	3	
International Commercial Arbitration & the Courts	Bermann	P	1	
Trial Practice	Duross, Kahn, & Koukios	B+	2	
Religion & the Work of a Lawyer Seminar	Uelmen	A-	2	
International Trade Law	Hillman	P	3	
Negotiations Seminar	Batson & Sellers	B+	3	

Scott Nielson
George Mason University School of Law
Cumulative GPA: 3.67

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Trial Level Writing	FitzGerald	B+	3	
Legislation & Statutory Interpretation	Rabkin	A+	2	
Criminal Law	Lerner	A+	3	
Civil Procedure	Newman	A-	4	
Contracts II	Boardman	A-	3	

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Property	Eagle	A	4	
Economic Foundations of Legal Studies	Johnsen	A	3	
Torts	Krauss	B+	4	
Introduction to Legal Research & Writing	FitzGerald	C+	2	
Contracts I	Boardman	B+	2	

Scott Nielson
Brigham Young University
Cumulative GPA: 3.72

Winter 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
3rd Year Spanish Reading, Grammar, Culture, and Composition	Jeffrey Turley	A-	3	
Topics in Music	Lloyd Miller	A	2	
American Heritage	Matthew Mason	A	3	
Honors Calculus 1	Jessica Purcell	B+	4	
Current Events & Political Science	Cindy Kern	P	1	
The Book of Mormon 1	Frank Judd	A	2	

Fall 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Honors Old Testament	Donald Parry	B+	2	
Honors World Civilization to 1500	Karen Carter	A-	3	
Honors World Civilization from 1500	Paul Kerry	A-	3	
3rd yr Spanish Reading, Grammar, Culture, Composition 2	Ana Chaparro	A-	3	
Basic Guitar Skill	Lawrence Green	A	2	
Honors University Writing	Erika Price	B-	3	
Beginning Bowling	Melanie Morgan	A	.5	

Winter 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Historian's Craft	Paul Kerry	B+	3	
Introduction to Music	David Brown	B+	3	
Legal Education & Practice	Catherine Bramble	A	2	
Beginning Weight Training		P	.5	
The Doctrine & Covenants	Jerome Perkins	A	2	
Public Speaking	Mark Woodruff	A-	3	

Spring 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intro to Spanish Literature	Karla Marrufo	A	3	
Contemporary Spanish Culture		W	3	Withdrew from Course

Survey of Hispanic-American Literature	Daryl Hague	A	3	

Summer 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Beginning Golf	Evan Nakachi	P	.5	
Geological Field Studies	Eugene Clark	B+	3	
US Through 1877	Neil York	A-	3	

Fall 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Deductive Logic	Codell Carter	A-	3	
Advanced Legal Internship	Kris Tina Carlson	A	1	
Middle East History to 1800	Glen Cooper	A-	3	
History of South African Liberation Movements	Leslie Hadfield	A-	3	
Economics Principles & Problems	Mark Showalter	B+	3	

Winter 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Thetean Publication	Edward Stratford	P	2	
The New Testament	Eric Huntsman	B+	2	
Thetean Editing	Edward Stratford	P	2	
Internship Program Preparation	Maren Fischer	A	1	
Iberian Civilization	Joaquina Hoskisson	A-	3	
US Constitutional History	Neil York	A-	3	
History of the Crusades	William Hamblin	A-	3	

Summer 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Spanish Phonetics & Pronunciation	Willis Fails	A-	3	
US Since 1877	Adam Eastman	A	3	

Fall 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Adv Seminar on Current Issues	Susan Rugh	A-	3	
Washington DC Internship	Susan Rugh	A-	9	

Winter 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law Lecture Series	Kris Tina Carlston			
Principles of Accounting	Kay Stice	A	3	
Financial Services Lecture Series	Cheryl McBeth	A	1	
Academic Internship	Julie Radle	P	3	
Principles of Biology	Rodney Hill	A-	3	
Capstone Research Seminar	Andrew Johns	B-	3	

Spring 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
The Book of Mormon 2	Mark Wright	A	2	

Scott Nielson
Fordham University Graduate School of Education
Cumulative GPA: 4.0

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Consultation and Collaboration in the Classroom	Lauren Keville	A	3	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Assessing and Developing Reading and Writing in Social Studies, Science, and Mathematics	Linda Correnti	A	3	
Special Education Foundations	Simon Shoushi	A	3	

Summer 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Historical, Philosophical & Multicultural Foundations of American Education	Molly Ness-Hill	A	3	
Psychology of Adolescent Development and Learning	Edwin Selby	A	3	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Teaching English and Social Studies in Inclusive Classrooms	Rhonda Bondie	A	3	
Teaching Linguistically And Culturally Diverse Adolescents	Sidonie Schneider	A	3	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Assessment of Learners with Disabilities	Diane Rodriguez	A	3	
Teaching Math and Science in Inclusive Classrooms	Rhonda Bondie	A	3	

Summer 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Research and Assessment of Adolescents	Carol Manocchi	A	3

March 06, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write in strong support of Scott Nielson's application to serve as your law clerk. Scott has taken two courses with me, and his performance was very impressive in both.

The first class was Constitutional Law I: The Federal System. At Georgetown, this is generally a first-year course, but this particular section was for students who had transferred to Georgetown after doing their first year elsewhere. I teach the class at a quite high level, using the hardest casebook, so students often find it challenging.

Scott was one of the strongest in a class of 45 students. In class discussions, he was one of my most reliable interlocutors, consistently drawing the most sophisticated theoretical connections. He also wrote one of the top exams in the class. His exam score plus his class participation gave him the second-highest overall score, easily earning an "A" for the course.

The following year, Scott took my Federal Courts class. This course covers the exceptionally intricate doctrine and theory regarding the role of the federal courts in our constitutional system. It is perhaps the most difficult course at Georgetown, and it self-selects our very best students. Again, Scott's class participation was excellent, and his exam performance was good too. Overall, he earned an "A-" in this very challenging course.

Scott also served on the Executive Board of the Georgetown chapter of the Federalist Society, and I got to know him a bit in that capacity as well. He strikes me as a serious and thoughtful young man, with both the intellect and the temperament to make a very strong law clerk.

I am pleased to recommend him for a position in your chambers.

Sincerely,

/s/
Nicholas Quinn Rosenkranz

Nicholas Rosenkranz - nqr@law.georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

March 06, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing to strongly recommend Mr. Scott Nielson for a clerkship position. I recently retired as Deputy Staff Director of the U.S. Sentencing Commission in Washington, D.C., and now am of counsel to Gerger, Khalil & Hennessy. I also serve as an adjunct professor of law at both Georgetown University Law Center and Washington College of Law at American University. I formerly served as an assistant federal public defender in Texas for 13 years and also as a lecturer at the University of Houston Law Center for a decade.

I taught Mr. Nielson in Criminal Procedure in the fall of 2015 at Georgetown. He excelled in the class, making one of only a handful of A's among 49 members of the class. I was well aware of Mr. Nielson before his performance on the final exam. He asked excellent questions and made cogent comments throughout the semester. I also should note that his performance in Criminal Procedure is even more remarkable considering that the other 48 students in the class, like Mr. Nielson, were all transfer students to Georgetown University Law Center. Today's highly competitive legal market for law school graduates has resulted in a large number of students who transfer after their first year to higher-ranked law schools. Georgetown regularly receives several dozens of such transfer students each year; they are required to take Criminal Procedure, which is a mandatory first-year course at Georgetown (unlike the vast majority of other law schools, where it is an upper-level course offering). I have taught transfer students at Georgetown during the past four years and found them to be, as a group, the "best and brightest" — and most competitive — of the students at Georgetown.

Mr. Nielson also took advantage of several opportunities to expand his legal education outside of the classroom: he had internships with a federal district judge, the Department of Justice, the S.E.C., and a U.S. Senator. Such real-world exposure to all three branches of government would serve him well as a law clerk.

Mr. Nielson has several qualities that make him stand out: his high level of intelligence and intellectual curiosity; strong communication skills, both oral and written; his obvious work ethic; his maturity and sense of judgment; and good social skills and personable demeanor. I regularly interview candidates for positions at the U.S. Sentencing Commission (including attorneys), and these are precisely the qualities for which I look in prospective employees. Furthermore, as a former law clerk myself — for a federal circuit judge in the early 1990s — I feel confident that Mr. Nielson would excel as a law clerk, just as he excelled in law school.

For these reasons, I enthusiastically recommend Mr. Nielson as a potential law clerk. He would be an asset to any federal judge. Feel free to contact me at 202-975-9105 if you wish to discuss his application.

Sincerely,
/s/
Brent E. Newton

Brent Newton - ben5@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

March 06, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write to strongly recommend Scott Nielson to be a clerk in your chambers. I have known Scott since the summer of 2015, when he was considering transferring from George Mason to Georgetown. After he emailed me, we spoke on the phone to discuss the pros and cons of such a move. Scott struck me then as a smart and motivated student.

Although I was on sabbatical for the 2015-16 school year, I met Scott at Georgetown Center for the Constitution events, where his attendance qualified him to attend our annual Salmon P. Chase Distinguished Lecture at the Supreme Court. In the fall of 2016, he took both my Constitutional Law II course and my Recent Books on the Constitution seminar.

Scott contributed regularly to class discussion in Constitutional Law II and did very well when I “cold called” on him to present the Heller case. Of course, he accurately described the facts of the case. But he also provided insightful commentary on the majority and dissenting opinions.

In my Recent Books on the Constitution seminar, Scott was an excellent participant in class discussions with the five visiting authors. When Professor Tara Smith visited to discuss her book, Judicial Review in an Objective Legal System, Scott posed a hypothetical question that gave her pause and made her question her theory. On his final written critique, he earned a perfect score by finding a weak point in Professor Ilya Somin’s book The Grasping Hand. In particular, he challenged Professor Somin’s argument that living constitutionalists should support a narrow conception of the public use clause.

In addition to his strong academic record, Scott has practical experience, teaching high school for two years in the Bronx, working for a summer for a federal district court judge, and interning for the SEC and the DOJ. Scott is a soft-spoken and a supremely polite and respectful student who you would enjoy working with in your chambers. If you are considering Scott, I would be happy to answer any questions you may have.

Sincerely.

Randy E. Barnett
Carmack Waterhouse Professor of Legal Theory
Director, Georgetown Center for the Constitution

Randy Barnett - rb325@law.georgetown.edu - 202-662-9936

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: *EX PARTE* APPLICATION OF SYLVIA BENEDEK KLEIN AND ELIANE BENEDEK SEGAL	Case No. 1:20-mc-00203-PKC

MEMORANDUM OF LAW IN OPPOSITION TO GERTRUDES GROUP'S MOTION TO INTERVENE, TO QUASH THE 2021 SUBPOENAS, TO VACATE THE SECTION 1782 ORDERS, TO SEQUESTER ANY DOCUMENTS PRODUCED, AND TO DISMISS THE PROCEEDING

Date: June 25, 2021

KOBRE & KIM LLP
800 Third Avenue
New York, New York 10022
Tel. +1 212 488 1200
Fax. +1 212 488 1220

E. Martin De Luca
Michael M. Rosen
Scott C. Nielson

Attorneys for Applicants Sylvia Benedek Klein and Eliane Benedek Segal

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **1**

ARGUMENT **2**

I. THE GERTRUDES GROUP FAILED TO SHOW CLEAR ERROR OR THAT THE COURT'S PRIOR ORDERS CONSTITUTE MANIFEST INJUSTICE 2

II. THE COURT SHOULD REJECT THE GERTRUDES' GROUP INVITATION TO ANALYZE AND INTERPRET BRAZILIAN LAW 3

III. THE GERTRUDES GROUP MISSTATES BRAZILIAN LAW IN MAKING ITS "FOR USE" ARGUMENT 5

A. The Gertrudes Group Wrongly Contends that Assets Located Abroad Are Completely Irrelevant to the Brazilian Proceedings 6

B. Brazilian Courts Have Jurisdiction Over Assets in Brazil Even if Those Assets Are Beneficially Owned by Offshore Structures 9

C. Under Brazilian Law, Gifts are Valued at the Time of Succession, Not at the Time of the Gift 9

D. Brazilian Law Permits Courts to Pierce the Corporate Veil to Reach Estate Assets 10

IV. The Gertrudes Group Misrepresents Numerous Rulings in the Brazilian Proceedings to Support Its Argument That Applicants Seek to Circumvent Foreign-Proof Gathering Restrictions 11

A. The First Zidane Motion 13

B. The Second Zidane Motion 13

C. The Zidane & Sestini Declaratory Actions 14

V. THE TARGETED DOCUMENT REQUESTS ARE NOT INTRUSIVE 15

VI. THE VARIOUS ALLEGATIONS OF A LACK OF CANDOR BY THE APPLICANTS 17

VII. THE DISCOVERY SUBJECTS RESIDE OR ARE FOUND IN THE SOUTHERN DISTRICT OF NEW YORK 19

CONCLUSION **20**

TABLE OF AUTHORITIES

Page(s)

Cases

2018 WL 5304849 (N.D. Cal. Oct. 24, 2018)..... 4

Abdalla,

No. 20 Misc. 727 (PKC), 2021 WL 168469 (S.D.N.Y. Jan. 19, 2021) 16

Brandi-Dohrn v. IKB Deutsche Industriebank AG,

673 F.3d 76 (2d Cir. 2012)..... 4

Bristol-Myers Squibb v. Superior Court of California,

137 S.Ct. 1773..... 20

Daimler,

571 U.S., 134 S.Ct. 746..... 20

Deposit Ins. Agency v. Leontiev,

2018 WL 3536083, (S.D.N.Y. 2018)..... 18

Euromepa S.A. v. R. Esmerian,

51 F.3d 1095 (2d Cir. 1995)..... 5, 15, 16

Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.,

141 S. Ct. 1017, 209 L. Ed. 2d 225 (2021) 20

In re Atvos Agroindustrial Investimentos S.A.,

481 F.Supp.3d 166 ..... 3, 6

In re Ex Parte Application of Kaihatsu,

2019 WL 1061740 (N.D. Cal. 2019)..... 4

In re Hornbeam Corp.,

No. 14 Misc. 424, 2015 WL 13647606, at *5 n.14 (S.D.N.Y. Sept. 17, 2015), aff'd, 722 F. App'x 7 (2d Cir. 2018) 19

In re Investbank PSC,

2020 WL 8512850 (S.D.N.Y. 2020) 19

In re Reyes,

2019 WL 6170901 (S.D.N.Y. 2019) 19

In re Speer,

754 F. App'x 62 (2d. Cir. 2019) 19

In re Veiga,

746 F. Supp. 2d 8 (D.D.C. 2010) 4

In re WinNet R CJSC,

2017 WL 2728436 3

In re WinNet R CJSC,

No. 16MC484(DLC), 2017 WL 1373918 (S.D.N.Y. Apr. 13, 2017) 12, 13

Intel v. Advanced Micro Devices,

542 U.S. 241 (2004) 15

Mees v. Buiter,

793 F.3d 291 (2d Cir. 2015) 3, 5, 15

Metallgesellschaft AG v. Hodapp,

121 F.3d 77 (2d Cir. 1997) 15

Pfaff v. Deutsche Bank AG,

No. 20 MISC. (KPF), 2020 WL 3994824 (S.D.N.Y. July 15, 2020) 21

Valle Ruiz,

939 F.3d 520 (2d Cir. 2019) 20

Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.,

956 F.2d 1245 (2d Cir. 1992) 2

Statutes

28 U.S.C. § 1782 ..... 2, 3, 4

28 U.S.C. § 1782(a) 19

INTRODUCTION

Stripping away the rhetoric that permeates the Gertrudes Group's[1] motion, the arguments focus on a flawed premise: that the discovery that the Applicants[2] seek cannot be considered "for use" in the Brazilian Proceedings. The Gertrudes Group also asks the Court to reverse its prior decisions on two discretionary factors—circumvention of proof gathering restrictions and intrusion—and on certain subpoena subjects that are "found" in this District. As explained below and in Applicants' supporting declarations, the Gertrudes Group: (1) fails to meet the standard for a motion to vacate the Court's prior 1782 orders; (2) asks the Court to interpret and analyze Brazilian law, contrary to binding precedent; (3) misstates Brazilian law in making its "for use" argument; (4) misrepresents the results of numerous rulings in the Brazilian Proceedings in arguing that the Applicants seek to circumvent foreign-proof gathering restrictions; (5) completely fails to support its conclusory statement that "the discovery sought is indiscriminate and massively intrusive"; and (6) wrongly contends that certain targets of the discovery requests are not found in this District. Finally, the Gertrudes Group makes numerous unfounded accusations, including that the Applicants lacked candor and unusually personal attacks on their counsel, none of which support an order vacating the Court's prior orders. For these reasons, the Court should deny the Gertrudes Group's motion.

BACKGROUND

In aid of the Brazilian Proceedings,[3] Applicants filed a Section 1782 Application (the "Original Application") on May 4, 2020, seeking authorization to take discovery from the Federal

[1] The "Gertrudes Group" refers collectively to Gertrudes Benedek ("Gertrudes"), Alexandre Roberto Benedek ("Alexandre"), Vivian Noemy Benedek Moas ("Vivian") and Evelyn Benedek ("Evelyn").
[2] "Applicants" refers collectively to Sylvia Benedek Klein ("Sylvia") and Eliane Benedek Segal ("Eliane").
[3] In May 2016, Suzana Aurélia Benedek, a sister of the Applicants, filed a probate petition with the Fifth Family and Probate Court of the Central District of São Paulo, proceeding n. 1045842-21.2016.8.26.0100 (the "Inventory Proceeding"), and on March 3, 2020, Sylvia and Eliane filed suit—(the "*Ação de Sonegados*," or "Action for Concealment of Assets"—against Gertrudes, Alexandre, Vivian and Evelyn, proceeding n. 1018413-

Reserve Bank of New York ("Federal Reserve") and the Clearing House Payments Company (the "Clearing House"), along with a motion to seal the docket. Dkt. No. 46 at 9-12. The Court granted the Original Application the following day along with the motion to seal. Dkt. No. 45 at 8-11. After receiving discovery from the Clearing House and the Federal Reserve, and based on what that discovery revealed, Applicants filed a subsequent Section 1782 Application (the "Second Application") to seek additional discovery from Charles Schwab & Co., Inc. ("Charles Schwab"), Citibank, N.A. ("Citibank"), Morgan Stanley & Co. LLC ("Morgan Stanley"), Raymond James Financial Services, Inc. ("Raymond James"), Sun Life Financial (U.S.) Services Company, Inc. ("Sun Life"), and Bank Leumi USA ("Bank Leumi") on January 14, 2021. *See* Dkt. No. 15. The Court granted the Second Application on February 17, 2021, authorizing Applicants to issue the revised subpoenas, on the condition that Applicants contemporaneously serve the Gertrudes Group. Dkt. No. 13. The Gertrudes Group filed its motion on May 25, 2021. Dkt. No. 57.

ARGUMENT

I. THE GERTRUDES GROUP FAILED TO SHOW CLEAR ERROR OR THAT THE COURT'S PRIOR ORDERS CONSTITUTE MANIFEST INJUSTICE

As a threshold matter, the Gertrudes Group ignores the legal standard on a motion to reconsider or vacate an order under 28 U.S.C. § 1782, which requires a showing of "clear error" or that the Order constitutes "manifest injustice." *See Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir. 1992); *see also In re WinNet R CJSC*, 2017 WL 2728436, at *1 (applying a "clear error" standard in a Section 1782 context, and noting that "[a] motion for reconsideration should be granted only when the defendant identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent

40.2020.8.26.0100 (together, the "Brazilian Proceedings"). Both proceedings are related to the estate of Emanuel Benedek, the late father of the Applicants.

manifest injustice.") (citation omitted). The Gertrudes Group fails to address this standard in its motion and has made no showing of "clear error" or "manifest injustice." For this reason alone, the Court should deny the motion.

II. THE COURT SHOULD REJECT THE GERTRUDES' GROUP INVITATION TO ANALYZE AND INTERPRET BRAZILIAN LAW

Section 1782 permits "discovery of any materials that can be made use of in the foreign proceeding to increase [the applicant's] chances of success." *Mees v. Buiter*, 793 F.3d 291, 299 (2d Cir. 2015). This "for use" requirement imposes a *de minimis* burden on the applicant to show that the requested discovery has some relevance to the foreign proceeding. *See In re Atvos Agroindustrial Investimentos S.A.*, 481 F.Supp.3d 166, 175 ("the Court finds that Applicant has made the required *de minimis* showing that it is seeking discovery 'for use' in proceedings in a Brazilian court.") (citing *In re Veiga*, 746 F. Supp. 2d 8, 18 (D.D.C. 2010) ("the burden imposed upon an applicant is *de minimis*"); *see also Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 82 (2d Cir. 2012) (finding evidence "for use" even if it would not be admissible in the foreign proceeding).[4]

[4] In a March 2012 article, Mayer Brown, the law firm representing the Gertrudes Group, evaluated the *Brandi-Dohrn* decision as follows:

> A recent decision by the US Court of Appeals for the Second Circuit ***expands the scope of discovery that foreign litigants may seek***…The Second Circuit has now held that a district court may issue a subpoena under Section 1782, even if the evidence sought would not be admissible in the foreign proceeding… Further, the court warned that requiring US courts to interpret foreign law on admissibility could "be fraught with danger."

See Christopher J. Houpt & Mark G. Hanchet, *Section 1782 Discovery: A Back Door for Foreign Litigants*, https://www.mayerbrown.com/en/perspectives-events/publications/2012/03/section-1782-discovery-a-back-door-for-foreign-lit. (last visited Jun. 24, 2021) (emphasis added). *See* Fourth Declaration of E. Martin De Luca ("Fourth De Luca Decl.") at ¶ 16 and Ex. M.

And when representing an applicant in a recent Section 1782 application, Mayer Brown adopted a position contrary to that of the Gertrudes Group regarding the permissiveness of the *for use* factor:

> Relevancy in the context of a section 1782 application is broadly construed and encompasses any material that bears on, or that reasonably leads to other matters that could bear on, any issue that is or may be in the

Applicants easily meet this standard, as they seek discovery to introduce it as evidence in the Brazilian Proceedings. In fact, the Applicants have already "used" certain discovery they obtained from the Original 1782 Application by filing it with the Brazilian court to show that the Gertrudes Group failed to disclose in the Brazilian Proceedings certain assets belonging to Emanuel's estate.[5] *See* Third Declaration of Luiz Fernando Fraga ("Third Fraga Decl.") at ¶ 6.

In arguing that the discovery at issue is not "for use" in the Brazilian Proceedings (despite the fact that the Applicants already successfully used it in Brazil), the Gertrudes Group invites the Court to interpret and analyze numerous complex areas of Brazilian succession law, including: (1) whether the Brazilian court can consider foreign assets in distributing assets within Brazil; (2) whether the Brazilian court has jurisdiction over assets in Brazil that are owned by offshore corporations; (3) whether the Brazilian court should value gifts in life at the time of the gift, or at the time of succession; and (4) whether the Brazilian court may pierce the corporate veil of a corporation to bring assets into the estate.

As the Second Circuit cautioned in *Euromepa*, the Court should reject this type of "speculative foray[] into legal territories unfamiliar to federal judges," because "[s]uch a costly, time-consuming and inherently unreliable method of deciding section 1782 requests cannot possibly promote the 'twin aims' of the statute."[6] *Euromepa S.A. v. R. Esmerian*, 51 F.3d 1095, 1099-1100 (2d Cir. 1995); *see also Mees v. Buiter* (rejecting requirement that discovery be

---

case…The requested evidence need not ultimately be used. *In Re Wallis*, No. 18-mc-80147-DMR, 2018 WL 5304849 at *4 (N.D. Cal. Oct. 24, 2018) at Dkt. No. 1.

The court in that case granted the Section 1782 application, writing a single sentence on the *for use* factor, "the requested discovery is for use in proceedings pending in the Tokyo District Court in Japan, a foreign tribunal." *See In re Ex Parte Application of Kaihatsu*, 2019 WL 1061740 (N.D. Cal. 2019).

[5] The Brazilian court ordered the Gertrudes Group to respond to this evidence, and the Gertrudes Group did so on June 23, 2021.

[6] The "twin aims" of the statute are to provide efficient means of assistance to participants in international litigation in our federal courts and encourage foreign countries by example to provide similar means of assistance to our courts." *Mees v. Buiter*, 793 F.3d at 298 (internal citations omitted).

"necessary" to the foreign proceedings because such a necessity requirement would require interpretation and analysis of foreign law). The Second Circuit has also cautioned that inquiries into foreign law create a "battle-by-affidavit of international legal experts" that can result in "[a] superficial ruling on [foreign] law." *Mees v. Buiter*, 793 F.3d at 299.

Here the Gertrudes Group contends that the discovery is not "for use" in the Brazilian Proceedings because the information that Applicants seek would not be relevant to the Brazilian Proceedings. In its attempt to prove as much, the Gertrudes Group submitted an expert affidavit that inevitably creates the inadvisable "battle-by-affidavit of international legal experts." And while Applicants respectfully submit that the Court should reject Gertrudes Group's invitation to analyze and interpret Brazilian law, Applicants show in detail below that the Gertrudes Group and its expert misstate Brazilian law and that the discovery at issue is relevant to the Brazilian Proceedings.[7]

III. THE GERTRUDES GROUP MISSTATES BRAZILIAN LAW IN MAKING ITS "FOR USE" ARGUMENT

The Gertrudes Group misstates or omits several critical points of Brazilian law in arguing that the discovery that Applicants seek could not be "for use" in the Brazilian Proceedings. First, the Gertrudes Group wrongly contends that assets located abroad are completely irrelevant to the Brazilian Proceedings. Second, the Gertrudes Group omits the fact that Brazilian courts have jurisdiction over assets in Brazil, even if those assets are beneficially owned by offshore structures. Third, the Gertrudes Group is wrong about the rule governing gifts; under Brazilian law, gifts are valued at the time of succession, not at the time of the gift. Finally, the Gertrudes Group fails to

[7] *See In re Atvos Agroindustrial Investimentos S.A.*, 481 F.Supp.3d at 175 ("the Court finds that Applicant has made the required *de minimis* showing that it is seeking discovery 'for use' in proceedings in a Brazilian court.")

acknowledge that Brazilian law permits courts to pierce a corporate veil to reach assets that belong to an estate.

A. The Gertrudes Group Wrongly Contends that Assets Located Abroad Are Completely Irrelevant to the Brazilian Proceedings

Applicants seek discovery in the United States because Brazilian judges, and in particular the Brazilian judge who is overseeing the Action for Concealment of Assets, may use evidence of assets abroad to ensure that the assets that are located ***in Brazil*** are evenly distributed between heirs. *See* Third Fraga Decl. at ¶¶ 7-8; *see also* Declaration of Giselda M. F. N. Hironaka and Gustavo F. de C. Monaco ("Hironaka & Monaco Decl.") at ¶ 31. To support its motion, the Gertrudes Group relies on an opinion that "the Brazilian judge has no jurisdiction or authority to request information from a foreign judge regarding assets of the deceased that are located abroad." Dkt. No. 56. This opinion misses the point. As set out in the attached declarations of two prominent professors in private international law and inheritance law at the University of São Paulo, the top ranked law school in Brazil, foreign assets are indeed relevant to the Brazilian Proceedings. *See* Hironaka & Monaco Decl. at ¶ 3. More specifically, Professors Hironaka and Monaco explain:

> Brazilian courts may properly exercise jurisdiction over foreign assets because of the need to consider the estate as a whole, in order to properly allocate the shares, which cannot be distributed unevenly. For this reason, when there are assets abroad and these are handed over to one of the heirs, it will be important for the Brazilian judge to take notice of this fact in order to rebalance the shares. This is a very common circumstance whenever there is an heir domiciled abroad or, at least, when there are assets located abroad. In these cases, if the assets abroad have been unequally distributed to one or more of the heirs, the Brazilian judge should consider that circumstance in order to rebalance the shares, allocating a proportionally greater share of the assets located in Brazil to the heirs who have not received the assets located abroad. *Id*. at ¶¶ 30-31.

In other words, a Brazilian judge may rely on information about assets abroad to make a fair allocation of assets within Brazil. *Id*. *see also* Third Fraga Decl. at ¶ 4. This legal doctrine is

well-settled in Brazil. *Id.* at ¶ 9; *see also* Hironaka & Monaco Decl. at ¶ 32. In fact, the Gertrudes Group's Brazilian counsel argued in a similar case that assets located abroad must be considered for the purposes of asset distribution in Brazil. *See* Third Fraga Decl. at ¶ 11. As he explained:

> Sending the party to the British Virgin Islands to seek the right to share the property, when by simple order the value could be returned, or shared abroad, or compensated with goods in [Brazil], would be totally unfair and at odds with most modern jurisprudence…Here, there can be an equalization of assets more easily, because it is composed of a pecuniary value already determined in the records…It is not believable that, in order to have a fair distribution, the Appellant has to litigate around the world, especially when the value of the assets can already be considered, as set by the Superior Courts. *See* T.J.S.P., Agravo de Instrumento No. 2164717-68.2018.8.26.0000, Relator: Des. Natan Zelinshchi de Arruda, 1-29 (Braz.)

The Gertrudes Group also took out of context an article by Professor André de Carvalho Ramos in its letter motion. Dkt. No. 35. The motion excerpts the following:

> …several Brazilian court precedents…recognize that the rule to establish the sole Brazilian jurisdiction for international and civil matters, *a contrario sensu*, does not allow a Brazilian court to rule a probate proceeding on the deceased's assets located abroad….[8]

The Gertrudes Group conveniently omitted that later in the very same article Professor Ramos asserts that assets located abroad ***must*** be considered in Brazilian probate proceedings to ensure a fair and even distribution of assets among the heirs:

> …it is possible to equalize the shares (if required by law) accounting for the amounts distributed in another jurisdiction…assets located abroad may be valued and included in the apportionment of assets before the Brazilian probate court, to the detriment of the heirs who holds such assets abroad. Therefore, the argument of the unenforceability of the Brazilian Court's decision on goods located abroad is refuted…since it is not necessary for assets outside Brazil to be reached by the Brazilian courts, but only that their values are

[8] To illustrate the evolution of Brazilian jurisprudence, in his article, Professor Ramos cites a nearly 40-year-old precedent from the Brazilian Supreme Court, that preceded the current Brazilian Constitution, which was enacted in 1988. The Brazilian Constitution established two courts: the Brazilian Supreme Court ("STF"), for interpretation of Brazilian Constitutional Law, and the Brazilian Superior Court of Justice ("STJ"), for interpretation of Brazilian Federal Law. As Professor Ramos described later in his article, the more recent precedents from the STJ (the highest court with applicable jurisdiction to interpret Brazilian Federal Law), have held that assets located abroad must be considered in Brazilian probate proceedings to ensure a fair and even distribution of assets among heirs. *See* Third Fraga Decl. at ¶ 16.